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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1913

No. [illegible] 55

CLIFFORD G. LUDVIGH, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF PHILLIP HOROWITZ AND JOSEPH HOROWITZ, INDIVIDUALLY AND AS COPARTNERS, &c., APPELLANT,

vs.

THE AMERICAN WOOLEN COMPANY OF NEW YORK AND THE NIAGARA WOOLEN COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 15, 1911.

(22,800.)

(22,800.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 724.

CLIFFORD G. LUDVIGH, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF PHILLIP HOROWITZ AND JOSEPH HOROWITZ, INDIVIDUALLY AND AS COPARTNERS, &c., APPELLANT,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 17, 1911.

	"	"	513.42
	"	"	220.68
282	Sept.	21	1,294.26
	"	"	653.40
	"	22	356.01
	"	"	339.87
	"	24	162.23
	"	26	111.11
	"	"	14.20
	"	"	126.74
	"	"	216.60
	"	"	367.31
	"	28	1,772.87
	"	"	38.10
	"	"	319.10
	"	"	16.30
	"	30	162.11
	"	"	102.78
	Oct.	1	70.12
	"	"	106.17
	"	"	127.00
	"	"	55.31
	"	"	80.11
	"	"	178.64
	"	"	53.19
	Oct.	4	160.46
	"	5	137.10
	"	8	15.20
	"	10	502.14
	"	"	274.96
	"	"	556.31
	"	"	107.23
	"	"	325.60
	"	11	270.22
	"	"	314.00
	"	"	114.67
	"	12	224.19
	"	13	62.04
	"	"	108.68
	"	14	52.60
	"	"	72.19
	"	"	54.85
	"	15	451.13
283	Oct.	15	153.64
	"	"	118.11
	"	"	166.71
	"	"	277.57
	"	"	52.50
	"	"	48.50
	"	17	165.61
	"	"	63.00

"	"	157.12
"	"	532.59
"	"	383.42
"	18	233.50
Oct.	19	2,332.33
"	"	53.21
"	"	351.73
"	21	242.17
"	24	188.72
"	"	53.23
"	"	35.71
"	"	149.60
"	"	456.99
"	25	73.66
"	"	1,647.39
"	"	51.28
"	26	51.62

together amounting to the sum of $28,169.37.

Seventh. As these checks were respectively received by the plaintiff they were endorsed either by Philip Horowitz or by his son David Horowitz in the name of the plaintiff as follows: "Niagara Woolen Co., Ph. Horowitz, President." Following this endorsement was a second endorsement made at the same time and by the same hand in one of the following forms: "Pay Pacific Bank or order Ph. Horowitz & Son." or "Ph. Horowitz & Son." Twenty-five of the said checks amounting to $7,321.76, were so endorsed by said Philip Horowitz, and sixty-four of them, amounting to $21,147.61, were so endorsed by said David Horowitz. David Horowitz was
284 neither an officer or employé of or in any way connected with the Niagara Woolen Company.

Eighth. After being endorsed, as stated in the last finding, all of the said checks were on or about their respective dates, deposited by the said Philip Horowitz or by his direction in the Pacific Bank, the defendant herein, and were accepted and collected by the bank and credited to the said account which Philip Horowitz had opened with the bank in the name of Philip Horowitz & Son.

Ninth. All of the moneys so collected on said checks and credited to said account by the defendant were afterwards paid by it to said Philip Horowitz or on his orders.

Tenth. Philip Horowitz, as president of the Niagara Woolen Company, had no right or authority to endorse said checks in the name of the company for the purpose for which such endorsements were made, nor could he authorize the said David Horowitz to make such endorsements for such purpose.

Eleventh. The purpose of making the said endorsements was to enable the said Philip Horowitz to get possession of the moneys belonging to the Niagara Woolen Company and appropriate and convert the same to his own use.

Twelfth. Section 2 of Article 3 of the by-laws of the Niagara Woolen Company defines the powers of the president of the company as follows:

"The president shall have charge of the sales to be made by the corporation and shall be its executive officer; he shall appoint and have supervision over all agents or employés of the corporation, excepting the treasurer's clerk, and may, from time to time, in
285 his discretion remove the same, but the number of said agents and employés and the compensation of any such agent and employé shall be subject to the approval of the board of directors, and the appointment and compensation of any agent or employé receiving compensation in excess of $1,200.00, shall also be subject to the approval of the stockholders. The president shall have authority to purchase supplies for the proper uses of the corporation, and to make contracts for the sale of merchandise and for purposes incidental to the business of the corporation, but he shall have no power to make contracts for the purchase of merchandise from any other person, individual or corporation, than the American Wooden Company of New York. The president shall also perform such other duties as may properly belong to his office, or as shall be prescribed from time to time by the board of directors."

No power was expressly given to him by any by-laws to endorse checks payable to the order of the company for any purpose.

Thirteenth. Section 1 of Article 4 of the by-laws defines the duties and powers of the treasurer, and provides, among other things, as follows:

"The treasurer shall have the care and custody of all the moneys, notes, bills of exchange, evidences of debts to the corporation, written contracts, vouchers belonging to the corporation he shall collect and receive, so far as he may, all moneys which shall be due and payable to the corporation, and, from the same, pay all debts of the corporation and otherwise disburse and dispose of the same upon and according to such order and authority therefor as shall be given from time to time by the directors; he shall have at all times power and authority to collect, receive and to give acquittances for all moneys due and payable to the corporation, and to endorse checks and drafts in its name and on its behalf. All moneys received by the
286 treasurer in behalf of the corporation shall be deposited in a bank or trust company or in banks and trust companies selected jointly by the president and treasurer, and no money belonging to the corporation shall be disbursed except upon the checks and drafts signed by the treasurer and countersigned by the president, or by a person designated in writing by the president, such writing to be filed with the treasurer."

And by Section 5 of Article 3 of the by-laws it was provided:

"Any and all money, notes, bills of exchange, evidences of debt and vouchers received by any of the officers of the corporation, or by any of the agents or employés of the corporation shall immediately be delivered to the treasurer."

Fourteenth. The vouchers hereinbefore referred to were all payable to the order of the plaintiff; they were all endorsed in blank in the name of the plaintiff by Philip Horowitz or by his direction in his name as president. They were all of them further endorsed by Philip Horowitz, or by his direction, in the name of Philip Horo-

witz & Son either in blank or to the order of the defendant and then delivered to the defendant to be collected and credited to the Horowitz & Son account. By these facts the defendant was frequently put upon inquiry that Horowitz acting, or assuming to act as president of the Niagara Woolen Company, was transferring to himself and appropriating to his own use moneys belonging to that company, and so was put upon inquiry. Had proper or reasonable inquiry been made by the defendant, it would have learned that in making such transfers, Horowitz was acting without authority and wrongfully and fraudulently misappropriating and converting the funds of the Niagara Woolen Company.

Fifteenth. The defendant bank was negligent in accepting the said checks so endorsed without inquiry and in treating them
287 as the property of Horowitz, or of Horowitz & Son, and in paying to Horowitz or Horowitz & Son the proceeds thereof.

Sixteenth. (Defendant's proposed finding IV amended.) The Niagara Woolen Company was incorporated on or about the 12th day of November 1902, and began business at No. 51 Greene street, New York City, upon the same premises in which Philip Horowitz & Son were then carrying on business. Subsequently, both Horowitz & Son and the Niagara Woolen Company removed their places of business to No. 132 Greene street.

Seventeenth. (Defendant's proposed finding V.) The capital of the plaintiff was twenty thousand dollars ($20,000) divided into two hundred shares of the par value of one hundred dollars ($100) each. Philip Horowitz subscribed for one hundred and ninety-five (195) shares of the said stock, Joseph Horowitz for three (3) shares, George H. Dane for one share, and Robert E. Hanlon for one share. Two of Joseph Horowitz's shares were subsequently transferred to Philip Horowitz, who then became the the owner of one hundred and ninety-seven (197) shares of the said stock, the said Dane and Hanlon were then in the employ of the American Woolen Company. At the time of the organization of the Niagara Woolen Company, Joseph Horowitz was elected president, and Thomas E. Dawber secretary and treasurer, and Peter C. Hartough was employed as bookkeeper of said company. Dawber, at the time, was also in the employ of the American Woolen Company.

Eighteenth. (Defendant's proposed finding VI amended.) Dawber, as treasurer, received no compensation or salary from the Niagara Woolen Company. The salary of Hartough, the
288 bookkeeper, was paid by the American Woolen Company. The business of the Niagara Woolen Company consisted wholly in selling goods consigned to it by the American Woolen Company. It did not receive or handle any merchandise, except that received from the American Woolen Company.

Nineteenth. (In lieu of defendant's proposed finding VIII.) On or about the 25th of November, 1902, an agreement was entered into between the American Woolen Company of the first part and Joseph Horowitz and Philip Horowitz of the second part, and Jeremiah F. Murphy of the third part, which recited that the parties of

the second part "are desirous of inducing the party of the first part to enter into a contract or agreement" with the Niagara Wooden Company and that "the party of the first part is unwilling to enter into said agreement or contract without security for the full and faithful performance thereof on the part of the said Niagara Wooden Company" and by which (among other things) the said Philip and Joseph Horowitz, jointly and severally, guaranteed to the American Wooden Company "the full and faithful performance of any and all covenants and conditions imposed on the Niagara Wooden Company by the contract between the said Niagara Wooden Company and the American Wooden Company which is hereto annexed marked A;" and by which the said Philip and Joseph Horowitz sold, assigned, transferred and set over unto the said Jeremiah P. Murphy 197 shares of the stock of the Niagara Wooden Company to be held by him in trust as security for the performance of said guaranty by said Philip and Joseph Horowitz; the said agreement declaring that in consideration of said guaranty "the said American Wooden Company does simultaneously with the signing herewith enter into and become a party to an agreement with said Niagara Wooden Company, which is hereto annexed marked A, and made a part thereof." The
289 agreement first referred to in this finding is in evidence as Defendant's Exhibit 2 April 8, 1907.

Twentieth. (Defendant's proposed finding VII amended.) The agreement above referred to as marked A was executed between the American Wooden Company and the plaintiff on said 25th of November, 1902, and thereby (among other things) the American Wooden Company agreed to deliver to the plaintiff from time to time "such goods, wares and merchandise as it in its judgment sees fit," the title to which was to remain in the American Wooden Company, and by which the Niagara Wooden Company agreed to keep the said merchandise insured in the name of the American Wooden Company and to sell the same and collect the proceeds thereof, and pay over to the American Wooden Company the amount collected for said merchandise "minus, however, the difference between the price at which said merchandise so contracted for has been invoiced to the party of the second part (plaintiff) and the price at which said merchandise has been sold as aforesaid by the party of the second part," and by which also the Niagara Company guaranteed the payment of all bills and accounts for said merchandise, and agreed that in case any merchandise delivered to it under the provisions of said agreement should not be so accounted for, it (the Niagara Company) would pay to the American Wooden Company the invoiced price of such merchandise, which, or the proceeds thereof, should thereupon become the property of the said Niagara Company. The said agreement is in evidence as Defendant's Exhibit 4, April 8, 1907.

Twenty-first. (Defendant's proposed finding X.) Thereafter and on or about the 17th day of November, 1903, a further agreement was entered into between the American Wooden Company and the Niagara Wooden Company, whereby the agreement of No-
290 vember 25, 1902, between said parties (referred to in the last preceding finding), which, by its terms, expired on Novem-

ber 25, 1903, was (with certain modifications) renewed and continued in force and effect for another year and until the 25th of November, 1904; and on or about said 17th of November, 1903, a further agreement was entered into between the American Woolen Company of the first part, Joseph Horowitz and Philip Horowitz of the second part, and Jeremiah P. Murphy of the third part, whereby the agreement of November 25, 1902, between the said parties (referred to in the nineteenth finding) was continued and renewed, and the 197 shares of the stock of the Niagara Wooden Company theretofore delivered to said Jeremiah P. Murphy were to remain in his hands as secretary for the performance by the Niagara Wooden Company of all the terms and conditions of said new agreement of November 17, 1903. These agreements are in evidence as Defendant's Exhibit I, April 8, 1907.

Twenty-second. (In lieu of defendant's proposed finding XI.) For the 195 shares of the stock of the Niagara Wooden Company issued to him, the said Philip Horowitz made and delivered to said company a mortgage on premises owned by him and known as No. 52 Eldridge street, in the City of New York, for the sum of $19,500. This mortgage was afterwards assigned by the Niagara Wooden Company to Abraham Rosen for a sum less than the sum due thereon, and the money received for it was paid by the Niagara Company to the American Wooden Company on account.

Twenty-third. (In lieu of defendant's proposed finding XII.) On or about November 25, 1902, the said Philip Horowitz made and delivered to the Niagara Wooden Company a writing of which the following is a copy:

"Niagara Wooden Company.

GENTLEMEN: I hereby offer to pay all the expenses of doing
291 business for the Niagara Wooden Company in consideration of the sum of $1,200 monthly to be paid out of the earnings of the corporation.

PHILIP HOROWITZ."

Twenty-fourth. (Defendant's proposed finding XIV.) Philip Horowitz paid all the expenses of the business of the Niagara Wooden Company, including salesman, insurance, rent, et cet.

Twenty-fifth. (Defendant's proposed finding XIII.) Joseph Horowitz continued as president of the Niagara Wooden Company until May, 1904, when Philip Horowitz was elected in his place. Thomas E. Dawber continued as secretary and treasurer and Peter C. Hartough as bookkeeper of the company from the time of its formation down to November, 1904.

Twenty-sixth. (Defendant's proposed finding XVII amended.) Philip Horowitz had general charge of the business of the Niagara Wooden Company; he sold the goods and opened and answered letters addressed to the Company and endorsed checks payable to the Company for deposit in the State bank, where the company kept its account. The place of business of the Niagara Wooden Company was closed on Saturdays and Jewish and other holidays.

Twenty-seventh. (Defendant's proposed finding XVIII amende
When checks were received, payable to the order of the Niag
Wooden Company, the endorsements placed upon them be
the same were deposited to the credit of the company in
bank, where it kept its account, were in the following form dur
Philip Horowitz's presidency

"Niagara Wooden Company,
By Philip Horowitz,
President,"

and during Joseph Horowitz's presidency

"Niagara Wooden Company,
By Joseph Horowitz,
President."

Sometimes a stamp was used containing the words

"Niagara Wooden Company,
_____,
President."

292 and the president at the time, Joseph or Philip Horow
wrote his name over the word "President" before deposit
the checks in the bank to the company's credit.

Twenty-eighth. (Defendant's proposed finding XXVI.) Ph
Horowitz during his presidency frequently designated David H
witz to endorse checks payable to the order of the Niagara Woo
Company.

Twenty-ninth. (Defendant's proposed finding XXVII.) It was
the custom of Dawber, the treasurer, to endorse checks.

But I also find that he did endorse checks for deposit, but not v
frequently, and that Hartough, the bookkeeper, was accustomed
endorse checks for deposit.

Thirtieth. (Defendant's proposed finding XXX amended.) Fr
July, 1903, to October, 1904, Hartough frequently saw David H
witz endorse checks for deposit two or three times a week.

Thirty-first. (Defendant's proposed finding XXI amende
During all the time the Niagara Wooden Company was in busin
Dawber, its treasurer, was a clerk with the American Wooden C
pany; he went to the office of the Niagara Wooden Company th
times a week or more, and looked over its books and accounts
affairs. In a few instances Hartough the bookkeeper, wrote
words:

"Niagara Wooden Company,
President,"

on the backs of checks payable to the company, and then handed
checks to Philip Horowitz, who wrote in his name above or before
word "President."

293 Thirty-second. (Defendant's proposed finding XX
amended.) Checks that came by mail and were received
Horowitz and given by him to Hartough, the bookkeeper, were po
by Hartough in the books, and he then in most instances made
deposit tickets. After May 1, 1904, deposits as a rule were m

by direction of either Philip or David Horowitz, and were usually sent to the bank by a messenger but sometimes by mail.

Thirty-third. (Defendant's proposed finding XXIII amended.) A regular set of books was kept by the Niagara Woolen Company including ledger, cashbook, sales book, check book, and bank pass book. Early in each of the months of May, June, July, August, September, October and November, 1904, the State Bank rendered to the Niagara Woolen Company a statement showing all deposits and payments made by or on account of the company during the preceding month.

Thirty-fourth. (In lieu of defendant's proposed finding XXIV.) The said statements showed that in several instances checks that were entered by the bookkeeper in the company's check book and then taken by Philip or David Horowitz for deposit, were not, in fact, deposited in the bank until ten or more days after such entries in the check book were made.

Thirty-fifth. (Defendant's proposed finding XXXI amended.) During the period beginning in June and ending in October, 1904, there was deposited with the defendant bank to the credit of Philip Horowitz & Son checks to the amount of $131,813.14, including checks enumerated in the preceding Sixth finding, and the checks payable to the order of the Niagara Woolen Company were intermingled with other checks deposited in the defendant bank by Horowitz & Son.

294 Thirty-sixth. (Defendant's proposed finding XXXII.) Between the 15th day of June and the 25th day of September, 1904, the defendant discounted for Philip Horowitz & Son the following notes:

1 on June 16 due Sept. 16 for	$3,000.
1 on June 16 due Oct. 17 for	3,000.
1 on July 12 due Nov. 25 for	3,000.
1 on Aug. 24 due Dec. 8 for	1,000.
1 on Aug. 24 due Dec. 30 for	1,000.
1 on Sept. 20 due Nov. 15 for	1,250.
1 on Sept. 20 due Dec. 12 for	1,250.

Thirty-seventh. (Defendant's proposed finding XXXIII.) None of the said notes have been paid, except the two discounted on June 16, each for the sum of $3,000. Horowitz & Son are indebted to the bank for the whole of the other notes, principal and interest.

Thirty-eighth. (Defendant's proposed finding XXXV.) The defendant had no notice of any restriction in the by-laws of the plaintiff affecting the authority of the president to receive money of the corporation or endorse checks of the corporation.

Thirty-ninth. No title to the checks enumerated in the preceding Sixth finding, nor to any of them passed to or vested in Philip Horowitz or Philip Horowitz & Son by or under the endorsement thereof made as stated in the preceding Seventh finding.

Fortieth. (At plaintiff's request.) Prior to the commencement of this action, plaintiff demanded of the defendant payment of the

said sum of $28,469.37, but defendant refused to pay the sa
in whole or in part.

And upon the facts aforesaid, I do find and decide as a conclus
of law:

That the plaintiff is entitled to judgment in this act
295 against the said defendant, the Pacific Bank, for the s
sum of twenty-eight thousand four hundred and sixty-n
dollars and thirty-seven cents, with interest thereon amounting
the date hereof to the sum of eight thousand and twenty-nine dol
and thirteen cents, together amounting to the sum of thirty-six th
sand, four hundred and ninety-eight dollars and fifty cents ($
498.50) and for costs of suit. Then I direct that judgment be ente
hereon in plaintiff's favor accordingly.

Dated, New York, June 17, 1909.

HAMILTON ODELL, *Referee*

Defendant's Proposed Findings of Fact and Conclusions of L

Supreme Court of the State of New York.

County of New York:

Niagara Woolen Company, Plaintiff,
against
Pacific Bank, Defendant.

I, Hamilton Odell, the Referee duly appointed in the above
titled action, to hear, try and determine the issues therein, do rep
That having been attended by the parties and their counsel,
having heard the proofs and allegations of the respective partie
do find, decide and determine as follows:

I find as Matter of fact—

I. That at all the times hereinafter mentioned, the plai
296 was and still is a domestic corporation, duly created by
existing under and by virtue of the laws of the State of
York.

Found. H. O., Referee.

II. That at all the times hereinafter mentioned the defendant
and still is a domestic corporation, duly created by and exis
under and by virtue of the laws of the State of New York.

Found. H. O., Referee.

III. That at all the times hereinafter mentioned, Philip H
witz was carrying on business under the firm name and styl
Philip Horowitz & Son, and in and about the month of Noven
1902, the said Philip Horowitz & Son were doing business at No
Greene street, in the Borough of Manhattan, City of New York.

As in report. H. O., Referee.

IV. That on the 25th day of November, 1902, the plaintiff
organized as a corporation and duly obtained permission to do
ness in the State of New York and began business at No. 51 Gr
street, upon the same premises in which Philip Horowitz &

carried on business, and that subsequently the firm of Philip Horowitz & Son moved to 131 Greene street, and the place of business of the Niagara Woolen Company was likewise 131 Greene street. That the books used by the Niagara Woolen Company in the beginning of their business were the same books which were, prior thereto, used by Philip Horowitz & Son.

Found, as amended in report. H. O., Referee.

V. That the capital of the said plaintiff was the sum of twenty thousand dollars ($20,000), divided into two hundred (200) shares of the par value of one hundred dollars ($100) each. That Philip Horowitz subscribed for one hundred and ninety-five (195) shares of the said stock, Joseph Horowitz for three (3) shares, George
297 H. Dame for one (1) share and Robert E. Hamlin for one (1) share. That two shares of Joseph Horowitz were subsequently transferred to Philip Horowitz, who then became the owner of one hundred and ninety-seven (197) shares of the stock of the plaintiff. That the said George H. Dame and Robert E. Hamlin were then in the employ of the American Woolen Company. That at the time of the organization of the Niagara Woolen Company, Joseph Horowitz was elected president and Thomas E. Dawber, secretary and treasurer, and Peter C. Hartough was employed as bookkeeper of the said company. That Dawber was at the said time in the employ of the American Woolen Company.

Found. H. O., Referee.

VI. That the said Dawber received no compensation as treasurer of the Niagara Woolen Company and that the compensation or salary of the said Hartough as bookkeeper was paid by the American Woolen Company. That the business conducted by the Niagara Woolen Company was of the same general nature as that previously conducted by Joseph Horowitz & Son, namely, to receive goods from the American Woolen Company and sell them on commission. That the Niagara Woolen Company did not at any time during its existence receive any merchandise or handle any merchandise except the merchandise received from the American Woolen Company. That the said Niagara Woolen Company has no creditor except the American Woolen Company.

Found, as amended in report. H. O., Referee.

VII. That on or about the 25th day of November, 1902, an agreement was entered into between the American Woolen Company and the plaintiff whereby the American Woolen Company agreed to deliver, from time to time, goods, wares and merchandise to the Niagara Woolen Company, the title to which merchandise
298 was to remain in the American Woolen Company, and by which agreement the Niagara Woolen Company agreed to keep the said merchandise insured and to sell the same and to collect the proceeds thereof, and pay over to the American Woolen Company the amount collected for the said merchandise, minus, however, the difference between the price at which the said merchandise was invoiced to the Niagara Woolen Company and the price at which the said merchandise had been sold by the Niagara Woolen Company, the Niagara Woolen Company guaranteeing the payment

of all bills and accounts representing such merchandise, and agr
ing, that in the event that the said merchandise is not thus
counted for, as aforesaid, to pay to the American Wooden Compa
the invoice price of the said merchandise, and thereupon to beco
the owner thereof.

As in report. H. O., Referee.

VIII. That simultaneously with the making of the said agr
ment, the said Philip Horowitz and Joseph Horowitz entered i
an agreement with the American Wooden Company by which
said Philip Horowitz and Joseph Horowitz, individually and joint
guaranteed to the American Wooden Company the faithful perfo
ance by the Niagara Wooden Company of all the terms and con
tions of the aforesaid agreement, and as security for the said gu
antee, the said Philip Horowitz assigned to Jeremiah P. Murp
as trustee, the one hundred and ninety-seven (197) shares of
stock of the Niagara Wooden Company owned by him.

As in report. H. O., Referee.

IX. That on or about the 25th day of November, 1902, a furt
agreement was entered into between Philip and Joseph Horow
and the American Wooden Company, by the terms of which
American Wooden Company surrendered to Philip and Joseph Ho
witz certain security which the said American Wooden C
299 pany had received from Philip and Joseph Horowitz un
an agreement dated the 15th of November, 1901, indemni
ing the American Wooden Company against losses in transacti
with Philip and Joseph Horowitz, and by the terms of which
agreement of November 25, 1902, it was agreed that the said
shares shall be held by said Murphy, as trustee, as security for
and all indebtedness which has arisen or which may arise betw
Philip and Joseph Horowitz and the American Wooden Compa
under agreement of the 15th of November, 1901, and also un
the agreement of the 25th day of November, 1902.

Not found. H. O., Referee.

X. That thereafter and on or about the 17th day of Novemb
1903, an agreement was entered into between the American Woo
Company and the Niagara Wooden Company whereby the
agreement of the 25th of November, 1902, which expired on
25th of November, 1903, was renewed to the 25th of Novemb
1904, with certain modifications as to discounts, etc., and by wh
the agreement of the said 25th of November, 1902, was contin
in full force and effect to and including the 25th of Novemb
1904, and that on or about said 17th day of November, 1903,
agreement was entered into between Philip and Joseph Horo
and the American Wooden Company whereby the 197 shares
stock of the Niagara Wooden Company theretofore delivered
Jeremiah P. Murphy, as security for the performance by the N
ara Wooden Company of all the terms and conditions of the ag
ment of November 25, 1902, were to remain with the said Murp
as security for the performance by the Niagara Wooden Company
all the terms and conditions of the agreement of November
1903,

Found. H. O., Referee.

300 XI. That at or about the time of the issuance of the said 195 shares of stock to the said Philip Horowitz, the said Philip Horowitz paid for the same by giving a mortgage in the sum of $19,500 on property owned by the said Philip Horowitz and known as No. 52 Eldridge street, in the city of New York. That the said mortgage was subsequently sold by the said Jeremiah P. Murphy, as trustee, for the sum of $12,500 in cash.

As in report. H. O., Referee.

XII. That at or about the time of the organization of the said Niagara Woolen Company, the said Philip Horowitz entered into an agreement with the company whereby the company agreed to pay the said Philip Horowitz $1,200 per month out of its earnings in consideration of which the said Philip Horowitz agreed to pay all the expenses of the business of the Niagara Woolen Company.

As in report. H. O., Referee.

XIII. That Joseph Horowitz continued as president of the Niagara Woolen Company until May, 1904, when Philip Horowitz was elected president in his place. That Thomas E. Dawber continued as secretary and treasurer of the Niagara Woolen Company from the time of its formation down to and including the month of November, 1904, and Peter C. Hartough as bookkeeper of said company during all of said time.

Found. H. O., Referee.

XIV. That Philip Horowitz paid all the expenses of the Niagara Woolen Company, including salesmen, employees, insurance, rent, storage and expenses of every kind.

Found. H. O., Referee.

XIV*a*. That he was entitled to the profits, if any, made by the said Niagara Woolen Company.

Not found. H. O., Referee.

304 XV. That the by-laws of the Niagara Woolen Company adopted about the time of its formation, after enumerating certain duties of the president, contained the following statement:

"The president shall also perform such other duties as may properly belong to his office, or as shall be prescribed from time to time by the Board of Directors. The president shall countersign all checks and may designate one person in his absence so to do."

As in report. H. O., Referee.

XVI. That said by-laws contain no restriction against endorsement by the president of checks and drafts payable to the order of the Niagara Woolen Company.

Only as in report. H. O., Referee.

XVII. That Philip Horowitz had general charge of the business of the Niagara Woolen Company, had full discretion with respect to the sale of goods and general management of the business, that he was authorized to receive money from customers, collect cash when cash was received in payment of accounts, open and attend to the mail. That the place of business of the Niagara Woolen Company was closed on Saturdays and Jewish holidays. That the Niagara Woolen Company kept their regular bank account in the State Bank of the city of New York.

As in report. H. O., Referee.

XVIII. That when checks were received payable to the order of the Niagara Woolen Company, the endorsements placed regularly upon the said checks before same were deposited was as follows:

"Niagara Woolen Company.
By Philip Horowitz.
President."

during Philip Horowitz's presidency, and

"Niagara Woolen Company.
By Joseph Horowitz.
President."

302 during Joseph Horowitz's presidency. That frequently a stamp was used containing the words:

"Niagara Woolen Company.
____ ____.
President."

and that Philip or Joseph Horowitz, as the case may be, wrote their name over the word "president" before depositing the checks in the bank.

As in report. H. O., Referee.

XIX. That all endorsements upon all checks payable to the order of the Niagara Woolen Company at all times during the continuance of its business were blank endorsements. That the words "Pay to the order of" or "For deposit in" were never placed upon the backs of the checks.

Not found. H. O., Referee.

XX. That Philip Horowitz, during the time of his presidency, had full power and authority to place his name on the back of the checks over the word "President" and that Joseph Horowitz, during the time of his presidency of the Niagara Woolen Company, had authority to place his name over the word "President" on the back of the checks, and that Philip Horowitz, during the time of his presidency, had authority to designate David Horowitz to write his, Philip Horowitz's name, on the back of the said checks over the word "President."

Not found. H. O., Referee.

XXI. That Thomas E. Dawber, secretary and treasurer of the Niagara Woolen Company, was in the regular employ of the American Woolen Company during the entire existence of the Niagara Woolen Company. That he came to the office of the Niagara Woolen Company two or three times a week only and then during business hours; that both he and the bookkeeper frequently saw Philip Horowitz and Joseph Horowitz endorse checks of the
303 Niagara Woolen Company, and that in a number of instances Dawber wrote the name "Niagara Woolen Company. ——

——, President," on the back of the checks of the Niagara Woolen Company and handed them to Philip or Joseph Horowitz, as the case may be, for them to sign their name over the word "President."

As in report. H. O., Referee.

XXII. That checks when received in the mail were entered by Hartough, the bookkeeper, in the check books and entries made by him in the ledger to the credit of the customer sending the checks. That deposit tickets were made out by the said bookkeeper and the said checks with the deposit slips then given to Philip or Joseph Horowitz or some employee to take to the bank, or, in some instances, mailed direct to the bank.

Found, as amended in report. H. O., Referee.

XXIII. That a regular set of books was kept by the Niagara Woolen Company including ledger, cashbook, sales book, check book, bank pass book. That the account of the Niagara Woolen Company with the State Bank was balanced monthly, and that on the first of each month, to wit, on the first of the month of May, June, July, August, September, October and November, the State Bank rendered a statement to the Niagara Woolen Company, which statement contained a record of the separate deposits and drafts of the Niagara Woolen Company with the said State Bank during the preceding month.

Found, as amended in report. H. O., Referee.

XXIV. That in many instances deposits of checks delivered to Philip or Joseph Horowitz were not made until from ten to twenty days after the date of the delivery of the said checks by the bookkeeper to Philip or Joseph Horowitz for deposit.

As in report. H. O., Referee.

XXV. That at monthly intervals during the year 1904, auditors were placed upon the books of the Niagara Woolen Company at the request of the American Woolen Company, who made examinations of the books of the Niagara Woolen Company and reported thereon.

Not found. H. O., Referee.

XXVI. That during the year 1904, there was deposited in the account of Philip Horowitz & Son in the Pacific Bank checks aggregating the sum of $28,469.37, which checks were drawn by customers of the Niagara Woolen Company and were payable to the order of the Niagara Woolen Company. That of the said checks, checks to the amount of $21,147.61 were endorsed "Niagara Woolen Company, Philip Horowitz, President," the name "Philip Horowitz" being in the handwriting of Joseph Horowitz, and checks to the amount of $7,321.76 were endorsed "Niagara Woolen Company, Philip Horowitz, President," the name "Philip Horowitz" being in the handwriting of Philip Horowitz.

As in report. H. O., Referee.

XXVII. That the said endorsements upon the said checks were blank endorsements made as aforesaid, and that following the said endorsements the words "Philip Horowitz & Son," was placed upon the said checks, and the checks deposited to the account of Philip Horowitz & Son with the defendant. That the said checks were

thereupon collected by the defendant and credited to the account of Philip Horowitz & Son by the defendant.

As in report. H. O., Referee.

XXVIII. That said moneys so deposited to the credit of the said Philip Horowitz & Son, with the exception of $2.28 were paid out by the defendant upon checks drawn on the defendant by Philip Horowitz & Son. That the said $2.28 still remains to the credit of the account of Philip Horowitz & Son with the defendant.

As in report. H. O., Referee.

305 XXIX. That no part of the moneys collected by the defendant bank upon the said checks was received by the bank in payment of any indebtedness due by Philip Horowitz & Son to the defendant.

Not found. H. O., Referee.

XXX. That the defendant bank acted as a collection agent in collecting the said checks for the said Philip Horowitz & Son.

As in report. H. O., Referee.

XXXI. That during the period beginning with June and ending with November, 1904, there was deposited with the defendant bank to the credit of Philip Horowitz & Son checks to the amount of $131,813.11 payable to the order of Philip Horowitz & Son, being checks received by Philip Horowitz & Son in the regular course of their business and that the checks payable to the order of the Niagara Woolen Company and checks payable to the order of Philip Horowitz & Son were intermingled in the deposits made by Philip Horowitz & Son in the defendant bank.

Found, as amended in report. H. O., Referee.

XXXII. That between the first day of June, 1904, and the 20th day of September, 1904, the defendant discounted for Philip Horowitz & Son the following notes:

One on June 16, due September 16, for	$3,000
One on June 16, due October 17, for	$3,000
One on July 12, due November 25, for	$3,000
One on September 20, due November 15, for	$1,250
One on August 24, due December 8, for	$1,000
One on September 20, due December 12, for	$1,250
One on August 24, due December 30, for	$1,000

Found. H. O., Referee.

XXXIII. That none of the said notes with the exception of the two dated June 16th each for the sum of $3,000 were 306 met at maturity, and that there remains due and owing by Philip Horowitz & Son to the defendant bank by reason of the discount, the sum of $7,500 and interest, no part of which has been paid.

Found. H. O., Referee.

XXXIV. That Philip Horowitz & Son repaid out of their own account in the Pacific Bank to the Niagara Woolen Company the sum of $1,140.20, which amount was drawn in checks of the Pacific Bank made by Philip and Joseph Horowitz to the order of the

Niagara Woolen Company, which checks were deposited to the credit of the account of the Niagara Woolen Company in its account in the State Bank.

Not found. H. O., Referee.

XXXV. That the defendant had no notice of any restriction in the by-laws of the plaintiff affecting the authority of the president to receive money of the corporation or endorse checks of the corporation.

Found. H. O., Referee.

XXXVI. That Philip Horowitz had the same authority to endorse the said checks that any president of a corporation would have to receive and endorse checks in the absence of any express provision in the by-laws regulating such matters.

Not found. H. O., Referee.

XXXVII. The following concession by the plaintiff appears in the record in this case:

"The REFEREE: I do not under-stand that the Pacific Bank is charged with bad faith.

Mr. WOLF: Not at all."

Not found. H. O., Referee.

XXXVIII. That Philip Horowitz & Son, after endorsing the said checks, obtained good title thereto.

Not found. H. O., Referee.

307 XXXIX. That the defendant had no knowledge of the fact that the checks so endorsed were not the property of Philip Horowitz & Son.

Not found. H. O., Referee.

XL. That the defendant acted in good faith in the transactions.

Not found. H. O., Referee.

Conclusions of Law.

I. That Philip and Joseph Horowitz were authorized to endorse the checks payable to the order of the Niagara Woolen Company.

Not found. H. O., Referee.

II. That the endorsement of the said checks passed the title thereto to said Philip Horowitz & Son.

Not found. H. O., Referee.

III. That the defendant is entitled to judgment herein, dismissing the complaint upon the merits, with costs.

Not found. H. O., Referee.

Dated, New York, June —, 1909.

—— ——,

Referee.

308 *Defendant's Additional Proposed Findings.*

Supreme Court of the State of New York, County of New York.

NIAGARA WOOLEN COMPANY, Plaintiff,
against
PACIFIC BANK, Defendant.

XX*a*. That Philip Horowitz, during his presidency, frequently designated David Horowitz to endorse checks payable to the order of the Niagara Woolen Company.

Found. H. O., Referee.

XX*b*. That David Horowitz was, during all the time of Philip Horowitz's presidency, in the employ of the Niagara Woolen Company.

Not found. H. O., Referee.

XX*c*. That Philip Horowitz was in general charge of the business of the Niagara Woolen Company during the year 1904, and was in effect the general manager of the business.

As in report. H. O., Referee.

XX*d*. That Philip Horowitz, during the year 1904, had general charge of the bank account of the Niagara Woolen Company.

Not found. H. O., Referee.

XX*e*. That when mail arrived in the morning, it was customary for either the bookkeeper, Philip Horowitz, David or Joseph Horowitz to open the mail.

As in report. H. O., Referee.

309 XX*f*. That it was not the custom for Thomas E. Dawber, the treasurer, to endorse checks.

Found. H. O., Referee.

XX*g*. That during Philip Horowitz's presidency, it was customary for Philip Horowitz or David Horowitz to endorse checks.

As in report. H. O., Referee.

XX*h*. That during the time of Joseph Horowitz's presidency, it was customary for Joseph Horowitz to endorse checks.

As in report. H. O., Referee.

XX*i*. That Dawber saw David Horowitz endorse checks for deposit between the month of July, 1903, and the month of October, 1904; that he frequently saw him endorse checks during that time, that is to say, two or three times a week at any rate.

Found, as amended in report. H. O., Referee.

XX*j*. That if moneys were received in cash, Philip Horowitz was the one to receive them.

Not found. H. O., Referee.

Dated, New York, June —, 1909.

Referee.

310 *Judgment.*

Supreme Court, New York County.

NIAGARA WOOLEN COMPANY, Plaintiff,
against
PACIFIC BANK, Defendant.

Issue having been joined in the above entitled action, and it having been by order of the Court made herein on March 26, 1909, referred to Hamilton Odell, Esq., to hear and determine the issue; and the parties hereto having appeared before said referee in person and by their respective counsel; and the proofs of the parties hereto having been heard and considered; and the referee having made and filed his report herein, dated June 17, 1909, finding and deciding that the plaintiff is entitled to judgment against the defendant in the sum of $36,198.50 and costs; and the costs of this action having been taxed at the sum of $998 35/100,

On motion of Hays, Hershfield & Wolf, attorneys for the plaintiff, it is

Adjudged that the plaintiff, Niagara Woolen Company, have judgment against the defendant, Pacific Bank, for the sum of $36,198.50, with interest from June 17th, 1909, amounting to $182 15/100 and the costs of this action, taxed as aforesaid at the sum of $998 35/100 aggregating the sum of $37,679 30/100 and that the plaintiff, Niagara Woolen Company, have execution against the defendant Pacific Bank, therefor.

Judgment entered this 19th day of July, 1909.

PETER J. DOOLING,
Clerk.

311 District Court of the United States, Southern District of New York, January, 1910.

CLIFFORD G. LUDVIGH, Trustee in Bankruptcy, &c.,
v.
AMERICAN WOOLEN COMPANY and NIAGARA WOOLEN COMPANY.

Final Hearing in Equity.

Abram I. Elkus, Garrard Glenn and James N. Rosenberg for Complainant.

Daniel P. Hays and Ralph Wolf for Defendants.

Statement of Facts.

HOUGH, *J.:*

Prior to 1901 and thereafter until the fall of 1904, Philip and Joseph Horowitz (father and son) constituted the firm of P. Horowitz & Son, which firm (and its members) became bankrupt on January 26, 1905. Complainant, as trustee for the firm of its members, brings this suit to recover the value of certain merchandise physically removed from the bankrupts' place of business by the defendants shortly before the filing of the involuntary petition herein. The bill of complaint also demands an accounting for certain moneys alleged to have been transferred shortly before petition by the bankrupt partnership to the defendant Niagara Woolen Company (hereinafter called Niagara Company). This
312 claim was not pressed at the hearing, for reasons sufficiently apparent from the facts to be stated. The Horowitz firm had been engaged in the purchase and sale of silk and woolen goods for some time before the organization of the American Woolen Company (hereinafter called Woolen Company) in 1901. The partners had been accustomed to buy (probably) much more than half their woolen goods from firms and corporations which became merged in the Woolen Company on the formation thereof.

From his appearance on the witness stand Joseph Horowitz must have been a very young man in 1901, and it is quite evident that as long as the firm lasted the controlling spirit thereof was (naturally) the father, Philip. Before organization of the Woolen Company Horowitz & Son had at times, if not steadily, carried a line of woolens averaging $40,000. After the formation (but how long after does not appear) of the Woolen Company, and on November 15, 1901, an agreement was entered into between Horowitz & Son and the Woolen Company by which (1) Horowitz agreed to accept goods "on consignment" from the Woolen Company, and in consideration of such consignment further agreed to "consider any and all shipments of merchandise as consigned, whether billed to that effect" or not. (2) The title to such consigned merchandise "or its proceeds" was always to be vested in the Woolen Company "until said merchandise is fully accounted for." (3) Horowitz agreed "to make all bills of such consigned goods payable to" the Woolen Company and to render "an account of sales" to the Woolen Company at least once a month. (4) Horowitz was also to give real estate security to protect the Woolen Company from any failure to "observe this consignment contract in its entirety." (5) Horowitz's profits were stipulated to be "the difference between the invoice prices
313 and the selling prices" of the consigned goods. (6) The "basis of terms" to Horowitz was to be 7 per cent. discount for four months, and any increase in profits by varying these terms to the trade was to go to Horowitz. (7) The Horowitz's were to have a drawing account of $1,200 a month, the same to be charged to profit account "provided the sales of goods made by P. Horowitz & Son shall warrant such payment."

This agreement was to extend until December 1, 1902, and during its continuance Horowitz was to "buy woolens" from no one except the Woolen Company. How closely this agreement was adhered to does not appear from the evidence, except that under it sales were made in the name of Horowitz & Son and bills for such sales sent to customers bearing a prominently printed legend in red ink to the effect that the amount was payable direct to the Woolen Company. The goods thus obtained by Horowitz continued to represent a stock of about $40,000.

It is obvious that this business arrangement was an endeavor on the part of the Woolen Company to retain title to all goods delivered to Horowitz, and to make all persons buying such goods through Horowitz debtors of the Woolen Company; but there is nothing in the agreement requiring Horowitz at any time to take and pay for such of the goods as were not sold; the requirement was to "account" for goods in January and July, but for all that appears from the agreement produced or the evidence herein goods were sufficiently accounted for by showing them on hand. As the term of the agreement of 1901 approached its end, the Woolen Company, for reasons not shown in the evidence, decided upon a different method of doing business with Horowitz, which method is expressed in divers agreements dated November 25, 1902, and in evidence. As to what occurred at this time, the actors in such occurrences and
311 their relation to each other, there is no conflict of evidence and it is sufficient for the purposes of this cause to state only my ultimate conclusions thereon. Both the elder and younger Horowitz were entirely under the control of the Woolen Company, so far as obtaining and marketing the product of that company was concerned. What they did was done on the order of the Woolen Company. For all that appears they were entirely willing to obey orders, but they either had to obey orders or forego much if not most of their business. Therefore, under orders from the Woolen Company, they contributed $300 and the Woolen Company $200 toward the capital stock of the then incorporated Niagara Company. The $500 thus obtained allowed the issue of five full paid shares of the capital stock of the newly formed corporation, and with said $500 the corporation itself paid the fees and expenses of the Woolen Company's counsel in and about the incorporation of the Niagara Company. The balance of the authorized capital stock ($20,000) of the Niagara Company was issued in consideration of the assignment or execution to the Niagara Company of a mortgage for the proper amount made by Philip Horowitz on certain real estate owned by him. (This was the same real estate which had been used *the* secure the performance of the "consignment agreement" of 1901). The Niagara Company then had on paper a fully paid-in capital stock, of which Philip Horowitz owned 197 shares, and the remaining 3 shares were distributed between his son and the two employees of the Woolen Company, who immediately became the directors of the Niagara Company. The sole business of that company, as revealed by its articles of association, was "to contract and deal with the American Woolen Company of New York and to deal in fabrics

received therefrom." There was also charter power to acquire
315 real estate, or mortgages thereon, not exceeding $20,000 at any one time, but this right was, under the evidence, plainly to be used only in validating the issuance of capital stock in the manner above set forth. The Niagara Company, having been thus formed with the limited powers above indicated and officered in such a manner as to insure its control by the Wooden Company, executed a contract with the Wooden Company dated November 25, 1902, whereby the Wooden Company agreed (1) to deliver to the Niagara Company such goods "as it in its judgment sees fit;" (2) the Niagara Company agreed to accept such goods, to hold them as the property of the Wooden Company and in such wise that "the title to the said (goods) shall pass directly from the (Wooden Company) to persons to whom the same shall be sold * * * in the manner and upon the terms herein contained;" (3) to keep the goods aforesaid insured in the name of the Wooden Company (whether this was ever done does not appear—it was not done regularly); (4) to "sell the goods" to persons selected by it (Niagara Company) and to collect all bills for such sales and "immediately to pay over to (Wooden Company) any amount (so) collected immediately upon its collection," minus the difference between the invoice price to the Niagara Company and the sale price fixed and collected by said company (Clause 4); (5) to guarantee payment of all bills for merchandise so sold, and "in case any merchandise delivered under the provisions of this agreement by (Wooden Company to Niagara Company) is not accounted for to (Wooden Company) under the provisions of Clause 4 of this agreement to pay (Wooden Company) the invoice price of said merchandise."

It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same "under the provisions of
316 Clause 4," but Clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Wooden Company the sale price thereof, less the difference between such price and the invoice value. It follows that if the Niagara Company could not account to the Wooden Company for money by selling the goods, it was nevertheless bound to pay the invoice price and (continues the written agreement) "thereupon title to said merchandise * * * so paid for shall pass to" the Wooden Company. It was further provided (6) that the invoices given by the Wooden Company to Niagara Company "are to be subject to the usual trade discounts" of the Wooden Company. Contemporaneously with the execution and delivery of this agreement between the two corporations the members of the bankrupt firm executed an agreement of suretyship to the Wooden Company "for the full and faithful performance" of the contract just mentioned on the part of the Niagara Company. By this agreement the partners guaranteed to the Wooden Company "the full and faithful performance of any and all conditions imposed on the Niagara Company" by said contract, and as further security for faithful performance the elder Horowitz transferred his 197 shares

of the Niagara Company to an officer or agent of the Woolen Company. These two agreements of November 25, 1902, were to endure for a year, but on November 17, 1903, were continued in force (with some modifications) to December 1, 1904. The modifications related only to the discounts to be allowed the Niagara Company, provided it turn over to the Woolen Company the invoice value of goods delivered to it "within sixty days (of the sale thereof) by the Niagara Company."

The Niagara Company, having thus a legal existence, full paid capital stock and a means of getting goods from the Woolen
317 Company, made the younger Horowitz (Joseph) its president, but in by-laws at once adopted limited the president's powers so that he was not authorized "to make contracts for the purchase of merchandise from any other person, individual, firm or corporation than the American Woolen Company of New York." Thus far Niagara Company had no quick assets and no working capital. Regarded as a separate corporation it had no machinery at all for carrying on a mercantile business. Obviously there must be some means provided for doing this, and it was accomplished by acting upon a communication from Philip Horowitz received at an adjourned meeting of the Niagara's incorporators held at the offices of the Woolen Company on November 25, 1902. Mr. Horowitz offered in writing "to pay all the expenses of doing business for the Niagara Woolen Company in consideration of the sum of $1,200 monthly, to be paid out of the earnings of the corporation." This offer was accepted, and thereafter and until the early summer of 1904 Philip Horowitz was paid this monthly amount usually if not with regularity.

If the documents submitted in evidence and the scheme thereby unfolded have been understood, it is manifest that the result thereof, if adhered to and recognized as lawful, was to enable the Woolen Company to send to the Niagara Company as great or as small a quantity of goods as it desired. Such is the express language of the agreement. There was no limit to the Niagara Company's obligation to receive goods from the Woolen Company, but the latter corporation was not bound to deliver any goods at all. Merchandise once delivered on consignment to the Niagara Company could be sold by the latter and any advance over invoice price or value retained, and it is evidently by such sales at advanced prices only
318 that the Niagara Company could make any earnings whatever. If the goods were not sold, or were sold at a loss or to persons who did not pay, it was nevertheless plainly incumbent upon the Niagara to pay to the Woolen Company the invoice price. The expenses of this business were to be paid by Philip Horowitz, and his obligation in form was to pay all the Niagara's expenses, no matter what they were, in consideration of $1,200 a month out of the "earnings" of that concern. If there were no earnings he had no claim to this monthly payment, but his obligation to pay the expenses of the business remained in force. It was further incumbent upon the Horowitz firm to make good every obligation of the Niagara Company to the Woolen Company, i. e., not only were all

sales guaranteed, but ultimate settlement with the Woolen Company on the basis of invoice price for all goods delivered was likewise covered, and to the performance of these onerous obligations the elder Horowitz had pledge substantially all the capital stock of the Niagara Company, which in turn represented a foreclosable interest in his personal real estate.

The mere statement of this paper scheme seems to me to show its unworkable nature. Perpetual business sunshine was essential for its continuance even from day to day. It therefore becomes interesting and material to consider the evidence of what was actually done under agreements stated between November, 1902, and October, 1904. On this subject the testimony of Joseph Horowitz seems to me frank and honest, though given under circumstances very painful to any son of Philip Horowitz. It was Joseph to whom was given the first intimation that the Woolen Company desired to put into effect any such scheme as this just outlined, and the way it was put to him (by an agent of the Woolen Company) was that his firm must incorporate. Doubtless the details of the plan were not present in the mind of the agent who spoke, but as ar-
319 ranged by that company's counsel it was the apparatus of the Niagara Woolen Company of which Joseph was given notice by the language above substantially quoted.

In response to inquiry he was at the same time told that business would go on as before, and it did go on as follows: Joseph, as president of the Niagara Company, went from time to time to salesmen of the Woolen Company, he advised them of what he wanted, and in due time received a memorandum of order specifying the quantity, quality and price of the goods to be sent to the Niagara Company "in accordance with agreement had between us as of November 25, 1902." In due time also a manifest or "copy of order" was sent to the Niagara Company, in which the time of delivery was stated, and the terms (of so much per cent. off for payment within specified periods) were given, as in ordinary bills rendered; the copy of order also stated that "these goods are delivered on consignment by (Woolen Company) and accepted by (Niagara Company) upon the express condition that the title thereto remains vested in (Woolen Company) until paid for." The goods thus ordered and billed were usually sent to the Horowitz place of business, but in some instances they remained in the Woolen Company's store or warehouse until wanted.

Obviously as to goods delivered at Horowitz's place some means of connecting them with the Niagara were desirable, and accordingly a sign reading "Niagara Woolen Company" was appended to the sign of Horowitz & Son displayed outside the door of the latter's establishment. This sign seems to have been reasonably conspicuous. In the back part of the store a stall or partition about ten feet square was boarded off, and there a set of books was kept in which were entered all goods received from the Woolen Com-
320 pany and all sales of such goods as reported by the Horowitz salesmen, for the Niagara Company never at any time had a sales department of its own.

The goods thus delivered by the Woolen Company bore tags which (if not removed) would serve to indicate their origin, but they were so mingled with other goods, both woolens and silks, obtained by Horowitz from divers sources, that there was nothing in the arrangement of goods in Horowitz's store to indicate that any particular goods were the property either of the Woolen Company or of the Niagara Company, or not the property of Horowitz. The books last referred to were at first kept by employees of Horowitz, but were so badly kept that in July, 1903, the Woolen Company, at its own expense, installed in the room or stall above described a bookkeeper, who thereafter kept accurate record of such goods as were billed and of such sales and payments as were reported to him through Horowitz. The volume of business thus done in Woolen Company goods remained at least up to normal standards (an average line of $40,000), and at times evidently exceeded that figure. In selling goods Horowitz and his clerks made no discrimination between Woolen Company goods and other goods; all were offered alike, and all customers were solicited through Horowitz; but when bills were rendered (at least as long as Joseph Horowitz was president of the Niagara Company) such bills for Woolen Company goods were in the name of the Niagara Company only. It sometimes occurred that when merchandise was sold in mixed lots (some from "consigned" goods and some from Horowitz's own stock) to the same customer, a check came in payable to Horowitz & Son only. This check was deposited and a cross check drawn in favor of the Niagara Company. All checks drawn to the Niagara's order
321 were (under Joseph Horowitz's presidency) deposited in a separate bank account in the name of the Niagara Company. The business thus conducted was visited almost daily by the secretary and treasurer of the Niagara Company (a clerk of the Woolen Company), whose duties consisted in examining the sales book, and with the consignment of Joseph Horowitz taking out of the Niagara Company's bank account as much money as the account would stand without undue depletion.

After the payment of attorney's fees for the formation of the Niagara's Company the only checks ever drawn out of its bank account were either in favor of the Woolen Company or in favor of Philip Horowitz for the $1,200 a month above alluded to. No dividends were paid on the Niagara's stock nor are any earnings of that company shown in excess of said $1,200 per month, while in the early summer of 1904 these payments were stopped because, in the opinion of the secretary and treasurer, the "earnings did not warrant" them.

In 1903 Joseph Horowitz objected that the terms of discount permitted by the Woolen Company were not sufficiently generous. He laid his claim before the proper agents of the Woolen Company and finally received a memorandum (in evidence), from which it would appear that substantially what Joseph had requested was to be granted to the "credit P. H. & Son." In December, 1903, Joseph Horowitz desired to have certain of the consigned goods taken back by the Woolen Company, but was informed that that company could not consent "to have thrown back into our stock fall goods

which were made expressly for you and delivered in accordance with the terms of the agreement" ("you" meaning Niagara Woolen Company.) Specific agreements were made to the effect that "off-price" goods which had been ordered by Joseph Horowitz, as president,
would be taken back by the Woolen Company, provided that
322 that company was saved harmless from all loss by such
sending back of goods. There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure from either the letter or the spirit of the written agreements first above set forth. The result was that if the Horowitz firm could not sell and collect for enough goods in a month to show $1,200 of "earnings" by the Niagara Company they got no contribution from the major portion of their business toward the payment of their rent, their clerk hire and their personal expenses. Yet they had nothing upon which they could honestly borrow. Joseph Horowitz deposes that he accordingly found the burden more than he could bear, resigned the presidency of the Niagara Woolen Company, and entered into a business of his own, not formally retiring from his father's firm, but after about May 1, 1904, having nothing to do therewith and rarely visiting the place of business. Philip Horowitz succeeded his son as president of the Niagara Woolen Company, and shortly entered upon the series of dishonest transactions which have ultimately produced this litigation. Instead of indorsing checks drawn to the order of the Niagara Woolen Company for deposit and thereafter putting them in the bank account of that corporation, he (as president) indorsed them in blank and thereafter deposited them in his own bank account and appropriated the proceeds to his own use—of course keeping these transactions concealed from the Woolen Company's bookkeeper in his own place of business and from the visiting secretary and treasurer. This lasted for several months—until a fire occurred in his place of business under circumstances so suspicious that an investigation was entered upon, pending which the petition in bankruptcy herein was filed, whereupon Philip Horowitz fled the jurisdiction and has not since
323 been seen nor heard of by any party to this litigation (so far as appears) nor by his own son. Upon the discovery of Philip Horowitz's dishonesty and probable insolvency the defendants herein removed from Horowitz's store all consigned goods then on hand (said to amount to over $33,000), and for an accounting as to the same this action is brought. The bill of complaint correctly alleges the main features of the plan above set forth, but it also asserts (in substance) that with the knowledge and connivance of the defendants, and especially of the officers and agents of the Woolen Company, that Horowitz & Son sold the "consigned goods in their own name and rendered bills in their own name and made collections accordingly," and that in most instances the proceeds of such sales were placed by the bankrupts "in their own bank account," so that in effect the bill charges that however legally good inter partes the paper scheme was, it was also from the beginning, or nearly so, practically disregarded, and is now used, and was always intended to be used, only as a protection in time of need; while ordinarily

the Horowitz firm with the knowledge and consent of the Woolen Company transacted their business, sold goods and made collections therefor exactly as if they had bought all the goods in their store for cash or credit in the ordinary way. This, as above sufficiently indicated, I do not believe to be true. There is no evidence of any actual fraud on the part of the Woolen Company; on the contrary, the evidence is clear that that corporation, acting under advice of counsel, perfected this plan in order to avoid suspected dangers in doing business with Philip Horowitz. The plan was believed to be lawful, and was honestly adhered to until within a short time of failure, when Philip Horowitz more than justified suspicion by flagrantly violating his own agreements and becoming a
324 fugitive from his creditors. This makes the case presented for decision on the evidence quite different from that before the Court on demurrer, but the bill is broad enough to fairly cover the claim now put forward by the trustee.

Decision.

Complainant's present position may be thus stated from the bill, which avers that by reason of the premises the "stock of goods delivered by said American Woolen Company and maintained at the said place of business of the bankrupts became and remained the property of the latter in so far as the rights of all the latter's creditors * * * are effected or in any way concerned." This is an assertion that the removed goods belonged in the eye of the law to the bankrupts, and therefore belong to their trustee, and that this case is brought to remove from said goods or their value the incumbrance created by the creation of the Niagara Company and the apparatus of contracts above recited. It may be admitted, and is found, that there was no actual fraud on the part of any one, in the sense either of suppression of truth or suggestion of falsehood practiced upon creditors. The existence and powers of the Niagara Company were matters of record, its presence at Horowitz's store was advertised by a sign, and any one might examine the form of bill rendered for many (if not most) of the sales made by Horowitz. Yet if the entire scheme as revealed by the agreements entered into or the conduct of the parties thereunder or both constitute a transaction fraudulent as matter of law," the good faith of all parties cannot avail as against creditors, and a trustee in bankrupcty is a proper party complainant to assert the creditors' rights (Skilton v. Coddington, 185 N. Y., 80). Nor does it advance the matter to point out that the arrangements complained of were valid and lawful
325 inter partes; that is admitted; but so are most conveyances actively fraudulent as against creditors. Neither is it important to dwell much upon the method of doing business under the contracts and agreements made. It often happens that what contracting parties do, how they deal with each other, after contract made, more clearly shows what they really intended to do than the written instruments by which they concealed rather than revealed their purposes. In this case about the only light cast on the parties'

writing by their acts makes the court certain that it was never intended by the Woolen Company to ship or deliver to Niagara Company more merchandise than Horowitz ordered, and he ordered only what he hoped to dispose of in what all parties regarded as his business. The presidency of the Niagara Company was thought of only as a part of the plan ordained by the Woolen Company, which was the only method by which Horowitz & Son could provide themselves with goods, and the plan itself was deemed but a legal substitute for the consignment agreement of 1901, as to which the Woolen Company's counsel had grown doubtful, while Horowitz thought of nothing but getting the goods and selling them at a profit which he could keep.

Let this matter, therefore, be tested by the written contracts. From them alone it is apparent that in substance and effect Horowitz & Son were obliged to pay the invoice price for every yard of goods delivered to the Niagara Company sooner or later, whether the merchandise was sold or not, and even if it were burned or stolen the Woolen Company was entitled to sue both father and son for such invoice price or any deficiency thereof, and if such suit was not desired the obedient directors of the Niagara Company could foreclose on the Horowitz real estate and so put the Niagara Company in funds to pay pro tanto. In short, the Woolen Company so arranged
326 matters that while carefully avoiding all such words as sale or conveyance, and procuring Horowitz to agree to such avoidance, it was from the moment of delivering goods contractually entitled to recover from Horowitz the sale price of those goods, and could not be compelled to resume possession of any of them; yet it always claimed and now claims to own outright what it would not take back and could sue for the price of. If this method of openly doing business is legal the defendants must prevail, but legality is not to be determined by words; a formal conveyance in fee may be but a mortgage and will not be saved by the strongest habendum clause ever penned; and where fraud, whether by active deceit or legal misnomer, is averred and proved the rights of parties are to be judged by their substantial position towards each other and not by the label they put on their transactions.

After patient consideration of this confessedly novel business device I am convinced that the vice of defendants' position is that they have wrongfully labeled what they did. They urge that the transaction was.

(1) A consignment and nothing else; and

(2) The bankrupts were not the consignees, but were at all times strangers to the goods, whence it follows that the Woolen Company owned the goods taken; but if not, then whoever owned them, Horowitz & Son certainly did not.

The first of these propositions will not bear investigation. A consignment is but a species of bailment, and if the so-called consignment does not respond to the legal tests for bailment it cannot be what the label calls for. Whether a delivery of goods does or does not constitute a bailment is primarily determined by the question whether the identical article delivered is to be returned. But

327 where there is no obligation on the part of the bailee to restore the specific article, even though he be at liberty to return another thing of equal value (instead of paying money), he becomes a debtor and the title to the property is changed; the contract in such a case is one of sale (Foster v. Pettibone, 7 N. Y., 433). And the same fundamental essential to any contract of bailment has been recognized and expounded time and again (see Cyc., p. 169, and cases cited; Benjamin on Sales, 7th ed., p. 5, and Powder Co. v. Burkhardt, 97 U. S., at 116). The ingenuity of man has devised many variants of bailment, and undoubtedly the mere fact that the bailee may sell the goods is not enough to render the original transaction a sale (Ex parte White, L. R., 6 Ch. App., 397, aff'd 21 W. R., 465), while deliveries to "sell or return" are well recognized forms of bailment (Sturm v. Boker, 150 U. S., 312); a bailee also may have the right to account for goods lost or consumed at a fixed price (Westcott v. Thompson, 18 N. Y., 363) without thereby becoming a vendee, and it is even possible (in some jurisdictions) that under an agreement made in good faith and clearly intended by both parties to be one of agency, a consignee of goods may sell at any price, while accounting to his consignor at a price fixed before hand (Harris v. Coe, 71 Conn., at 163).

It remains, however, always true that what the contract means is a question of fact, sometimes to be submitted to a jury (Crosby v. D. & H. Canal Co., 119 N. Y., 333), but finally when the facts are ascertained presenting a question of law for the court (Westcott v. Thompson supra). The contract between the Woolen Company and Niagara Company does not respond favorably for defendants to even the most generous test. It has never been held that one to whom goods were delivered, which he not only might sell, but must pay for
328 whether he sells them or not, and who also cannot return any of the merchandise, is a bailee, and if he be not a bailee he cannot be a consignee.

In my opinion the contracts in question plainly show an endeavor to obtain for the Woolen Company all the rights of both vendor and bailor, while denying to the Niagara Company the privileges of either a vendee or bailee. This cannot be done as against creditors who are entitled to have the test of law applied to the transaction, however valid as between the parties themselves. The authorities on this subject (after the inherent nature of the contract is ascertained) have been so recently collected in Referee Dexter's able report. (In re Penny & Anderson, N. Y. Law Journal, January 4, 1910) that further citation seems superfluous. See, however, under Bankruptcy Act of 1867, Re Linforth (4 Saw., 370). Nutter v. Wheeler (2 Low., 336). Holding then, as I now do, that in legal effect the delivery of the goods in question to the Niagara Company constituted a sale to that company, it remains to consider whether this finding can benefit the creditors of Horowitz. In this branch of the case I find no difficulty, although no similar litigation has been instanced. The analysis above made of the contract between the Woolen Company and the Niagara Company has assumed (for argument's sake) that the latter was an independent concern actually making contracts

on its own behalf and maintaining a real existence separate and apart from the Wooden Company and from Horowitz. It is, however, too plain for argument that such was not the case; if it had not been for the agreement of Horowitz & Son guaranteeing the performance of every covenant and obligation entered into by the Niagara Company and for the real estate security furnished (in effect) by Philip Horowitz as collateral to the promise of his firm, the written
329 engagements made between the Niagara Company and the Wooden Company would have been absurdities. There was no real person for the Wooden Company to contract with except the bankrupts, and the whole and avowed meaning and intent of the arrangement was not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them. If the Wooden Company could not have dealt with an independent Niagara Company in the manner it did without having its dealing result in a sale, then that situation is not bettered by the intervention between the Wooden Company and Horowitz of a paper corporation which was merely another name for the Wooden Company itself. If the Niagara Company had really been an independent concern, had itself become bankrupt with numerous creditors, and the Wooden Company had removed from its premises goods in like manner as it removed them from Horowitz's store, then for the reasons above given such creditors through their trustee could have recovered against the Wooden Company. If, however, Niagara Company had carried on its own real and independent business through Horowitz's clerks and mingled its goods with Horowitz's goods, then it is true that Horowitz's creditors could have had no recourse against Wooden Company, whatever might have been their rights against Niagara Company, and Horowitz would then have been a stranger to the Wooden Company, however intimate might have been his relations with the Niagara Company. But when the Wooden Company in the very beginning creates the Niagara Company not for the purpose of doing business with it, but for the purpose of doing business with Horowitz, then the real substantive agreement made is not the idle form of the consignment contract with the Niagara Company, but that which was intended as between the Wooden Company
330 and Horowitz and expressed with perfect plainness in the latter's indemnity agreement. From what source was the Wooden Company to receive payment for its goods? From the goods themselves, if possible; but who was to sell those goods? Plainly Horowitz, and, if he could not sell them, to whose property did the Wooden Company have recourse? Nominally to the capital stock of the Niagara Company, which, however, meant no more than the foreclosure of a mortgage upon Philip Horowitz's house.

The legal effect of this arrangement was exactly the same as that even more plainly expressed in the consignment agreement between the Wooden Company and Horowitz of 1901, with this difference only —that so far as the paper writings are concerned Horowitz could return in 1901 goods he did not want, whereas when in 1902 the transparent window of the Niagara Company was erected between himself and the Wooden Company he was forbidden that privilege.

It is highly improbable that in practice there was any such difference between 1901 and 1902, but the difference between the written documents is clear. It results, therefore, that in my opinion the legal effect of the transactions shown in evidence is that at the time defendants removed the goods which are the subject of this suit such goods had been delivered to Horowitz & Son and were in their possession in pursuance of the contracts of November 25, 1902, whereof the legal result was to render the persons to whom the goods were delivered and intended to be delivered (i. e., Horowitz & Son) the vendees of the same.

The complainant will therefore have an interlocutory decree requiring the defendants to account for the goods admittedly taken or the value of the same, together with costs to be taxed.

331 In the District Court of the United States for the Southern District of New York.

CLIFFORD J. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners Doing Business under the Firm Name of Philip Horowitz & Son, Complainant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants.

The above named defendants, American Woolen Company of New York and Niagara Woolen Company, considering themselves aggrieved by the decrees entered herein on March 8, 1910, and March 10, 1910, and each of them, wherein and whereby it was, among other things, ordered, adjudged and decreed that the complainant is entitled to a decree of judgment against the said defendants American Woolen Company of New York and Niagara Woolen Company, for the sum of $52,668.19, being the principal amount of the judgment and costs embraced in this action, do hereby appeal from the said decrees and from each and every part thereof, and each of them, to the Circuit Court of Appeals for the
332 Second Circuit, for the reasons specified in the assignment of errors filed herein, and pray that this, their appeal, may be allowed, and that a transcript of the record, papers and proceedings upon which said decrees were made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Second Circuit.

HAYS, HERSHFIELD & WOLF,
Solicitors for Appellants, American Woolen Company of New York and Niagara Woolen Company.

Office and Post Office Address, No. 115 Broadway, Borough of of Manhattan, City of New York.

Order.

The foregoing petition on appeal is granted, and the claim of appeal, therein made, is allowed.

Dated, August 1st, 1910.

C. M. HOUGH,
District Judge and One of the Judges of said United States District Court, Presiding Therein.

333 At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the General Post Office Building, in the Borough of Manhattan, City of New York, on the 1st day of August, 1910.

Present: Hon. Charles M. Hough, District Judge.

CLIFFORD J. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners Doing Business under the Firm Name of Philip Horowitz & Son, Complainant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants.

On motion of Ralph Wolf, Esq., solicitor and of counsel for defendants, it is

Ordered that an appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decrees heretofore filed and entered herein March 8th, 1910, and March 10th, 1910, be and the same hereby are, and all of them hereby is allowed, and that a certified transcript of the record, testimony, exhibits, stipu-
334 lations and all proceedings herein, be forthwith transmitted to said United States Circuit Court of Appeals for the Second Circuit. It is

Further ordered that the bond on appeal be fixed at the sum of $50,000, the same to act as a supersedeas bond, and also as a bond for cost and damages on appeal.

Dated, Aug. 1st, 1910.

C. M. HOUGH,
District Judge.

District Court of the United States for the Southern District of New York.

CLIFFORD J. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners Doing Business under the Firm Name of Philip Horowitz & Son, Complainant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Clifford J. Ludvigh, as Trustee in Bankruptcy of the estate and effects of Philip

Horowitz and Joseph Horowitz, individually, and as co-
335 partners doing business under the firm name of Philip Horowitz & Son, and Messrs. James, Schell & Elkus, his attorneys:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Second Circuit to be holden at the City of New York in the State of New York, on the 30th day of August next, pursuant to an order allowing an appeal entered in the Clerk's office of the District Court of the United States for the Southern District of New York, in that certain action No. — in which the American Woolen Company of New York and Niagara Woolen Company, are defendants and appellants, and Clifford J. Ludvigh, as Trustee in Bankruptcy of the estate and effects of Philip Horowitz and Joseph Horowitz, individually, and as copartners doing business under the firm name of Philip Horowitz & Son, is complainant and appellee, to show cause, if any there be, why the said decrees rendered against the defendants and appellants as in the said order allowing an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Charles M. Hough, Judge of the United States District Court in and for the Southern District of New York, this 1st day of August, 1910.

C. M. HOUGH.
United States District Court Judge.

Service of the within citation and a copy thereof is admitted this third day of August, 1910.

JAMES, SCHELL & ELKUS.
Attorneys for Respondent.

(Endorsed:) Petition for Appeal.—Order allowing appeal and citation.—Filed Aug. 4, 1910.

336 District Court of the United States, Southern District of New York.

CLIFFORD J. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners Doing Business under the Firm Name of Philip Horowitz & Son, Complainant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants.

Bond for Damages and Costs.

Know all men by these presents:

That we, the American Woolen Company of New York and the Niagara Woolen Company, as Principals, and the United States Fidelity and Guarantee Company, having an office and usual place

of business at No. 66 Liberty Street, in the City of New York, a
Surety, are held and firmly bound unto Clifford J. Ludvigh, a
Trustee in Bankruptcy of the estate and effects of Philip Horowit
and Joseph Horowitz, individually and as co-partners doing busines
under the firm name of Philip Horowitz & Son, in the sum of Sixt
Thousand Dollars ($60,000), lawful money of the United State
of America, to be paid to the said Clifford J. Ludvigh, as Truste
in Bankruptcy of the estate and effects of Philip Horowitz an
Joseph Horowitz, individually and as co-partners doing busines
under the firm name of Philip Horowitz & Son, for the pay
337 ment of which well and truly to be made, we bind ourselves
our successors and assigns, jointly and severally, firmly b
these presents.

Sealed with our seals, and dated this 22nd day of July, in the yea
one thousand nine hundred and ten.

Whereas, the above named American Woolen Company of New
York and Niagara Woolen Company have prosecuted their appea
to the United States Circuit Court of Appeals, for the Second Cir
cuit, to reverse the decree rendered in the above entitled suit, b
the Judge of the District Court of the United States, Southern Dis
trict of New York;

Now, therefore, the condition of this obligation is such, that if th
above named American Woolen Company of New York and Niagar
Woolen Company shall prosecute their appeal to effect, and answe
all damages and costs if they fail to make their plea good, then thi
obligation shall be void, otherwise, the same shall be and remain i
full force and effect.

AMERICAN WOOLEN COMPANY OF
NEW YORK.

By ——— ———

Attest:

NIAGARA WOOLEN COMPANY

By —— ——.

Attest:

—— ——.

Sealed and delivered and taken and acknowledged this — day
of July, 1910, before me —— ——.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:

GEORGE E. HAYES,
Attorney-in-Fact.

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, before me personally appeared —— ——
of The American Woolen Co. of New York, with whom I
338 am personally acquainted, who being by me duly sworn said
That he resides in the State of —— —— that he is ——

of the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of the Board of Directors of said corporation; and that he signed his name thereto as —— —— by like authority.

And the said —— —— further says that he — acquainted with —— —— and knows him to be the —— of the said corporation; that the signature of the said —— —— subscribed to the said instrument is in the genuine handwriting of the said —— —— and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said —— ——

—— ——.

STATE OF NEW YORK,
County of New York, ss:

On this — day of ——, before me personally appeared —— —— of the Niagara Wooden Co. with whom I am personally acquainted, who being by me duly sworn said: That he resides in the State of —— that he is —— of the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of the Board of Directors of said corporation; and that he signed his name thereto as —— by like authority.

And the said —— —— further says that he is acquainted with —— —— and knows him to be the —— of the said corporation; that the signature of the said —— —— subscribed to the
339 said instrument is in the genuine handwriting of the said —— —— and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said —— ——

—— ——.

Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.

[Vignette.]

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of The American Woolen Co. of New York and Niagara Woolen Co. as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the pro-

visions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of The Niagara Woolen Co. and American Woolen Co. of N. Y. is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and
340 that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 22 day of Jul., 1910.

DANIEL C. DEASY.
Notary Public, New York County.

(Endorsed:) Bond for damages and costs filed Aug. 4, 1910.—"Approved 7/2/10.—C. M. Hough, D. J."

341 In the District Court of the United States for the Southern District of New York.

CLIFFORD J. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Philip Horowitz and Joseph Horowitz, Individually and as Copartners Doing Business under the Firm Name of Philip Horowitz & Son, Complainant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants.

Come now the American Woolen Company of New York and Niagara Woolen Company, appellants, and make and file the following assignment of errors, upon which they and each of them will rely upon the prosecution of their appeal from the decree made by this Honorable Court on March 4, 1910, and entered March 8, 1910, and from the decree made by this Honorable Court on March 10, 1910, in the above entitled cause:

1. That the United States District Court in and for the Southern District of New York erred in overruling the demurrer interposed by the defendants to the original bill of complaint filed in this cause.

2. That the said Court erred in not sustaining the demurrer interposed by the defendants to the original bill of complaint
342 filed in this cause, upon the ground (1) that the said bill of complaint did not state facts sufficient to constitute a cause

of action against these defendants, and (2) upon the ground that it appeared by the complainant's own showing by the said bill of complaint that this Court is without jurisdiction to determine the cause.

3. That the said Court erred in making, rendering and entering a decree herein in favor of the said complainant and against the defendants, on the 8th day of March, 1910.

4. That the said Court erred in making, rendering and entering a decree herein, in favor of the said complainant and against the defendants, on the 10th day of March, 1910.

5. That the said Court erred in not dismissing the said suit and entering a final decree therein in favor of defendants, and for their costs against complainant.

6. That the said Court erred in ordering, adjudging and decreeing that the plan, device and arrangement, and the actings and doings of the defendants, as alleged in the bill of complaint and as appearing on the proofs were and are, as matter of law, in fraud of the rights of creditors, and each of them, whose claims were duly proven and allowed against the estate and assets of the bankrupts.

7. That the said Court erred in not ordering, adjudging and decreeing that the said plan, device and arrangement, and the actings and doings of the defendants were and are valid and legal, and gave rise to no cause of action against the defendants in favor of complainant.

8. That the said Court erred in ordering, adjudging and decreeing that the removal and disposal by the American Woolen
343 Company of New York of the 760 pieces of woolens mentioned in the bill of complaint, constituted and was, as matter of law, in fraud of the aforesaid creditors of said bankrupts, and was and is void in pursuance of the Bankruptcy Act of 1898 and the amendments thereto.

9. That the said Court erred in not ordering, adjudging and decreeing that the removal and disposal by the American Woolen Company of New York of the 760 pieces of woolens mentioned in the bill of complaint, was and is in all respects valid and legal, and was not and is not in fraud of the rights of the creditors of the bankrupts.

10. That the said Court erred in ordering adjudging and decreeing that the complainant as Trustee of the estate and effects of the aforesaid bankrupts, is entitled to the aforesaid property, and all of it, to wit, 760 pieces of woolens described in the bill of complaint, or the value thereof as the same existed on October 26, 1904, to wit, the sum of $39,685.27, together with interest thereon at the lawful rate on the 26th day of October, 1904.

11. That the said Court erred in not ordering, adjudging and decreeing that the complainant as the Trustee of the estate and effects of the said bankrupts, was not entitled to the aforesaid property, or any part of it, to wit, 760 pieces of woolens described in the bill, or the value thereof, and that the complainant was not entitled to the value thereof or interest thereon.

12. That the said Court erred in ordering, adjudging and decreeing that the complainant is entitled to a decree of judgment against the defendants for the sum of $39,685.27, and that we have execution therefor.

13. That the said Court erred in ordering, adjudging and d
ereeing that the said complainant do also have and recove
344 of and from the said defendants, the interest upon said sm
of $39,685.27, at the lawful rate of six per cent. per annu
to be computed from October 26, 1904, and the costs of the co
plainant in this cause to be taxed, and that the complainant hav
execution therefor.

14. That the said Court erred in ordering, adjudging and d
ereeing that Clifford J. Ludvigh as Trustee in bankruptcy of th
estate and effects of Philip Horowitz and Joseph Horowitz, indivi
nally and as copartners doing business under the firm name
Philip Horowitz & Son, bankrupts, have and recover from the d
fendants the sum of $39,685.27., together with the sum of $12
798.50., being the interest on said first named sum from October 2
1904, and the sum of $184.82, costs as taxed by said Clerk, pursua
to said decree, making in all the sum of $52,668.19., and that sa
complainant have execution therefor.

15. That the said Court erred in not ordering, adjudging and d
ereeing that the defendants were not indebted to the complainant i
any sum whatsoever, and dismissing complainants' bill of complain
and entering a final decree therein in favor of the said defendan
for their costs against the complainant.

16. That the said Court erred in denying the motion of couns
for defendants made at the point during the trial of said cause wh
counsel for complainant announced that complainant had offere
all the testimony in his possession and had announced a rest as t
all the evidence.

17. That the said Court erred in not ordering, adjudging an
decreeing that the title to said 760 pieces of woolens described in th
bill, or the value thereof, was and is in the American Woole
345 Company of New York, and complainant has no right, tit
or interest therein or thereto.

18. That the said Court erred in not ordering, adjudging an
decreeing that the title to said 760 pieces of woolens described in th
bill, or the value thereof, was and is in the Niagara Wooden Com
pany, and complainant has no right, title or interest therein
thereto.

19. That the said Court erred in denying the motion made b
the attorney for the defendants to strike out of evidence the lett
"Complainant's Exhibit 2," because it did not appear that the lett
was written by the witness, David Gallert, by the direction of eith
Mr. Murphy, or any officer of the American Wooden Company
New York.

20. That the said Court erred in overruling the objection
counsel for the defendants to the reception in evidence of the pap
marked "Complainant's Exhibit 12," objection having been mad
on the ground that it had not been proved by the witness Josep
Horowitz that the said paper and alleged agreement had been signe

21. That the said Court erred in overruling the objection
counsel for defendants to the following question asked of the wi
ness Joseph Horowitz:

"Q. Your father, Philip Horowitz, executed and delivered a mortgage to the American Woolen Co. to secure them from any loss by reason of the contract made with Philip Horowitz & Son by reason of the contract made with Philip Horowitz & Son by the American Woolen Co. Do you know on what property that mortgage was?"

In order that the foregoing assignments of error may be and appear of record, the defendants present the same to the Court,
346 and pray that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and defendants pray a reversal of the said decrees appealed from, and each and every part thereof, entered by the United District Court for the Southern District of New York.

HAYS, HERSHFIELD & WOLF,
Solicitors for Defendants, Office and Post Office Address, No. 115 Broadway, Borough of Manhattan, City of New York.

(Endorsed:) Assignment of Error and prayer for reversal filed August 4, 1910.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

CLIFFORD J. LUDVIGH, Trustee in Bkrcy, etc., Complainant-Appellee,
vs.
AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defts.-Appellants.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.
347 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 26th day of November in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and twenty-fifth.

[SEAL.] THOMAS ALEXANDER, *Clerk.*

348 United States Circuit Court of Appeals for the Second Circuit
October Term, 1910.

No. 194.

CLIFFORD J. LUDVIGH, as Trustee, etc., Complainant-Appellee,
vs.
THE AMERICAN WOOLEN COMPANY OF NEW YORK and THE NIAGARA WOOLEN COMPANY, Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

Argued April 3, 1911.
Decided May 8, 1911.

Before Lacombe, Coxe and Ward, Circuit Judges.

WARD, *Circuit Judge*:

November 15, 1901, P. Horowitz & Company entered into a written contract with the American Woolen Company, to run to December 1902, whereby the Woolen Company agreed to consign goods Horowitz & Company, the title to the goods or their proceeds remain in the Woolen Company until fully accounted for; all bil for the consigned goods to be made payable to the Woolen Company Horowitz & Company to receive as their compensation the differen between the invoice and selling price (which were not to be less tha the invoice) and to be allowed a drawing account of $1,200 a mon to be deducted from their profits. They were also to give security by way of a lien upon real estate to protect the Woolen Company again loss by reason of any failure on their part to observe the agreemen

It was also provided that Horowitz & Company were not to bu
349 woolens of anyone but the Woolen Company. This word rea in connection with the whole agreement must be understoo as meaning to deal with no one else. If it be given the literal co struction of purchasing, then the sale to them was not an absolut but a conditional sale.

The Woolen Company, apparently because it entertained suspicion of Horowitz & Company and perhaps also because its counsel mi understood the decision of this court In re Carcewich, 115 F. R., 8 declined to continue the contract and required that the busines should be done thereafter through a corporation. Such a corporatio was formed under the name of the Niagara Woolen Company "t contract and deal with the American Woolen Company of New Yor and to deal in fabrics received therefrom."

November 25, 1902, an agreement was executed between the Amer can Woolen Company and the Niagara Woolen Company whereb the former agreed to consign goods to the latter for one year on su stantially the same terms as contained in the agreement of Novembe 15, 1901, with Horowitz & Company. The capital of the compan

was $20,000 in 200 shares of $100 each, 195 of which were issued to Philip Horowitz in consideration of a mortgage of $19,500 on certain real estate being the same security mentioned in the former agreement.

On the same day an agreement was executed by the American Woolen Company of the first part, Horowitz & Company of the second part and J. P. Murphy of the third part, whereby Horowitz & Company guaranteed the faithful performance of the contract by the Niagara Company and Philip Horowitz as security transferred 195 shares of that company's stock to Murphy in trust to vote the same for such person as president of the Niagara Company as Horowitz & Company should designate and in case of failure of the Niagara Company or of Horowitz & Company to perform their covenants respectively, to transfer the stock to the American Woolen Company.

The American Woolen Company elected Joseph Horowitz president and one of its own employees treasurer of the Niagara Company and a by-law was adopted requiring all checks on the funds of the company to be signed by the president and treasurer jointly. The Niagara Company had an office on the premises of Horowitz & Company and a sign on the outside door. Subsequently the American Woolen Company also employed a bookkeeper who kept an account of all its goods billed to the Niagara Company and of all sales and payments reported by the Horowitzes. The goods were sold in the name of the Niagara Woolen Company and the proceeds of sale deposited in its bank account.

The business was carried on strictly in accordance with the agreement of November 25, 1902 until May, 1904, when Joseph Horowitz withdrew from all participation in the business of Horowitz & Company, which was continued by Philip Horowitz who also became President of the Niagara Company. He soon began to embezzle the funds of the Niagara Company by endorsing checks received by him to its order in its name and depositing them in the bank account of Horowitz & Company. October 26 a very suspicious fire occurred on the premises. Philip Horowitz fled the country and has not been heard of since. On or about October 26 the American Woolen Company removed from the premises of Horowitz & Company 760 pieces of goods consigned to the Niagara Company.

October 31 a petition in bankruptcy was filed against Horowitz & Company, followed January 26, 1905, by an adjudication.

July 17, 1907, the Trustee in Bankruptcy filed this bill in the District Court against the American Woolen Company and the Niagara Woolen Company praying that the agreements of November 25, 1902, above mentioned and the removal of the said goods might be declared void under the Bankruptcy Act as in fraud of the creditors of Horowitz & Company and that the defendants might be decreed to deliver the woolens removed by the American Woolen Company or their value, $39,685.27, to him and also to pay over to him the proceeds of woolens sold, to the amount of $25,000 paid to the American Woolen Company within four months of the filing of the petition in bankruptcy, with interest from October 26, 1904.

A demurrer to the bill having been overruled, the defendants an
swered, denying all the charges of fraud and praying that the bill b
dismissed with costs.

The learned judge below found that there was no actual frau
on the part of anyone connected with the agreements that they wer
made under the advice of counsel to protect the America
351 Woolen Company against danger in doing business wit
Philip Horowitz and were good inter partes. But he hel
that the American Woolen Company was at the same time tryin
to get the privileges of a bailor and the rights of a vendee and tha
the contract must be treated as against the creditors of Horowitz
Company as an absolute sale. He disregarded the Niagara Woole
Company entirely. His conclusion that the transaction was a sa
is in large part founded on the following clauses in the agreemen
between the American Woolen Company of the first part and th
Niagara Woolen Company of the second part:

"IV. Said party of the second part agrees to sell such merchan
dise to such person or persons as they shall judge to be of good cred
and business standing, and to collect for and in behalf of the part
of the first part, all bills and accounts for the merchandise so sol
and to immediately pay over to the said party of the first part an
amount collected as aforesaid immediately upon its collection, minu
however, the difference between the price at which said merchandis
so collected for has been invoiced to the party of the second pa
and the price at which said merchandise has been sold as aforesai
by the party of the second part."

"V. Said party of the second part hereby guarantees the paymen
of all bills and accounts for merchandise, possession of which i
delivered to it under this agreement, and it hereby agrees, in cas
any merchandise delivered under the provisions of this agreemen
by the party of the first part to the party of the second part, is no
accounted for to the party of the first part, under the provisions o
Clause IV of this agreement, to pay to the party of the first part th
invoice price of said merchandise, and thereupon title to said mer
chandise, or the proceeds thereof, so paid for shall pass to the part
of the second part, and shall then be exempted from the provision
of this agreement."

Upon this subject he says:

"It is to be observed that this document requires the Niagara Com
pany to pay the invoice price of the merchandise delivere
352 to it unless it accounts for the same 'under the provisions o
Clause 4,' but Clause 4 contains, as above set forth, a specifi
agreement on the part of the Niagara Company to sell the merchan
dise and pay over to the Woolen Company the sale price thereof, les
the difference between such price and the invoice value. It follow
that if the Niagara Company could not account to the Woolen Com
pany for money by selling the goods, it was nevertheless bound t
pay the invoice price and (continues the written agreement) 'there
upon title to said merchandise * * * so paid for shall pass t
the Niagara Company."

But Clause IV plainly refers to accounting for goods sold by the Niagara Company and we think the merchandise "not accounted for to the party of the first part under the provisions of Clause IV" means merchandise sold. Merchandise on hand would be accounted for by the fact that it was on hand. This appears clearly from the provisions of Clause VIII:

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

The purpose of this clumsy interposition of the Niagara Company was, as counsel for the American Woolen Company points out, that it should be a sort of cash box for the Woolen Company and check on the transactions of Horowitz & Company. Though there are some inconsistencies in the language of the agreements and in the correspondence between the parties we are clearly of the opinion that it was their purpose honestly to make a consignment or factorage agreement. The goods were to be sold by Horowitz & Company at not less than the invoice price and the proceeds were to be turned over at once to the American Woolen Company. The transaction regarded either as a consignment or as a conditional sale of Horowitz & Company was entirely legal as against their creditors.

[2] Such agreements are valid notwithstanding that credit may sometimes be given to a factor or to a conditional vendee because of his apparent ownership of property in his possession, though in this case there is no evidence whatever of any such thing. Contracts of sale under which title is to remain in the vendor although the vendee may consume the goods or sell them and apply the proceeds to his own use are fraudulent as to creditors because the stipulation title is to remain in the vendor is entirely inconsistent with the purpose of the contract. In re Garcewich, supra; In re Penny & Anderson, 176 F. R., 111. The agreements which we have had under consideration are contracts of an entirely different character and contain elaborate provisions to prevent the consignee from consuming the goods or selling them and applying the proceeds to their own use. The decree is reversed with costs out of the estate but not against the Trustee personally.

D. S. Hayes, for the Appellants.

A. I. Elkus, for the Appellee.

354 United States Circuit Court of Appeals for the Second Circuit

Argued April 3, 1911. Decided May 8, 1911.

CLIFFORD J. LUDVIGH, as Trustee, etc., Complainant-Appellee,
vs.
THE AMERICAN WOOLEN COMPANY OF NEW YORK and THE NIAGARA WOOLEN COMPANY, Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Ward, Circuit Judges.

LACOMBE, *C. J.*:

The construction of Clauses IV and V adopted by the District Judge seems to me to be the correct one and, concurring in his reasoning and conclusion, I dissent from the opinion of the majority of this court.

355 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 18th day of May, one thousand nine hundred and eleven.

Present:

Hon. E. Henry Lacombe,
Hon. Alfred C. Coxe,
Hon. Henry G. Ward, Circuit Judges.

CLIFFORD J. LUDVIGH, as Trustee, etc., Complainant-Appellee,
vs.
AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decrees of said District Court be and it hereby is reversed with costs, to be paid out of the estate.

It it further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.

356 Endorsed: United States Circuit Court of Appeals, Second Circuit. C. J. Ludvigh vs. American Woolen Co. and ano.

Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 18, 1911. William Parkin, Clerk.

357 United States Circuit Court of Appeals for the Second Circuit.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, Individually and as Co-partners Doing Business under the Firm Name of Phillip Horowitz & Son, Bankrupts, Complainant-Appellant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK and NIAGARA WOOLEN COMPANY, Defendants-Appellees.

Petition for Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of Clifford G. Ludvigh respectfully shows:

(1) That he is Trustee in Bankruptcy of Phillip Horowitz and Joseph Horowitz, individually and as members of the firm of Phillip Horowitz & Son, and that he has duly qualified by giving the bond required of him.

(2) That on July 18, 1907, your petitioner filed his bill of complaint in equity in the office of the Clerk of the United States District Court for the Southern District of New York; which said bill prayed for a decree adjudging that certain transactions occurring between the defendants and the aforesaid bankrupts be set aside as fraudulent, and that your petitioner as Trustee as aforesaid
358 was entitled to certain woolens, or the value thereof as the same existed on October 26, 1904, to wit, $39,685.27, on the ground that by reason of the aforesaid transaction the said woolens were the property of the bankrupts at the time of the filing of the bankruptcy petition against them in so far as the rights of all the latter's creditors, among whom were those whose claims had been proven and allowed against the said bankrupts' estate, were affected or concerned.

(3) That thereafter the defendants filed their demurrer to the aforesaid bill, which demurrer, upon consideration thereof by said District Court, was overruled; and thereafter and on May 21, 1908, the defendants filed their answer herein and the cause come on to be heard before the Honorable Charles M. Hough, District Judge, on January 3, 1910, at an Equity Term of said District Court. Thereupon proofs were taken in open Court before said Judge and the cause was argued by counsel. Thereafter and on January 17, 1910, the said District Judge filed his opinion wherein he decided that a decree be entered in favor of your complainant against the defendants. Thereafter and on or about March 8, 1910, a decree was entered in and by said Court in said cause, *de* decreeing that the complainant have judgment against the defendants for the aforesaid sum of $39,685.27, together with the interest thereon at the lawful rate from October 26, 1904, such interest to be computed by the Clerk of

said Court and the costs of the complainant likewise to be tax
by said Clerk. Said costs having been taxed and inter
359 computed, a final decree was entered in and by said Co
in said cause on or about March 11, 1910, adjudging th
your petitioner recover against said defendants the sum of $52,668.
being the aforesaid sum of principal, interest as computed, and co
as taxed.

(4) That the defendant appealed from said decree to this Cou
on or about August 1, 1910, and that thereafter said appeal w
argued in this Court. Thereafter and on or about May 19th 1911 th
court issued, made its judgment and issued its mandate reversing t
decree of said United States District Court with costs, amounting
$555.32, to be paid out of the estate of said bankrupts, and directi
that the aforesaid bill of complaint be dismissed with costs, payab
as aforesaid.

(5) That in said bill your petitioner alleged that certain arrang
ments made between the defendant American Wooden Company
New York and the bankrupts, which resulted in the organizatio
of the defendant Niagara Wooden Company, and subsequent furth
arrangements between the defendants and the bankrupts, and the a
ings and doings of the defendants thereunder, were made with inte
to hinder, delay, and defraud the creditors of the said bankrupts.
a result of such arrangements your petitioner alleged that short
before the time of the filing of the petition in bankruptcy herein t
bankrupts had at their place of business in New York City 7
pieces of woolen of the value of $39,685.27; that at or abo
360 the time of the filing of the petition and in pursuance of su
arrangements the defendant American Wooden Company
New York, claiming to be entitled to do so by virtue of said arrang
ments, carried away the said woolens and disposed of the same as
own property, whereas your petitioner alleged that by reason of t
aforesaid transactions the said woolens which had been delivered
said American Wooden Company and maintained at the bankrup
said place of business became and remained the property of the lat
in so far as the rights of all of their creditors, among whom we
those whose claims had been duly proven and allowed against sa
bankrupts' estate, were affected or concerned. The said Distri
Judge who heard the proofs and decided the cause in said Distri
Court adopted the view of the complainant and directed and d
creed the judgment against the defendants as already stated. B
this Court reversed the said decree of said District Court and direct
that your petitioner's bill should be dismissed with costs, payable o
of the bankrupts' estate.

(6) Your petitioner respectfully alleges that the said mandate
this Court reversing the order of said District Court and directi
the dismissal of said bill is erroneous, and your petitioner feels a
grieved thereby and is desirous of obtaining a review by the Su
preme Court of the United States of the said mandate upon errors a
signed in the assignment of errors filed herein. Your petitioner
advised by counsel that there are grave doubts that the judg
361 ment and mandate of this Court are valid, and your pet
tioner is advised that grave errors at law have been committe
by this court.

Wherefore your petitioner prays that an appeal may be allowed to the Supreme Court of the United States and that a citation be issued for the review of the said judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit by said Supreme Court, and that a transcript of the proceedings and papers upon which said mandate and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States at Washington for its determination as to matters involved under said appeal; and your petitioner as in duty bound will ever pray, etc.

Dated, New York, June 2nd 1911.

CLIFFORD G. LUDVIGH,
As Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, Individually and as Co-partners Doing Business under the Firm Name of Phillip Horowitz & Son, Bankrupts, Petitioner.

ABRAM I. ELKUS,
GERRARD GLENN,
Of Counsel.

The foregoing petition for appeal is allowed this 7th day of May, 1911.

H. G. WARD,
Judge U. S. Circuit Court of Appeals, Second Circuit.

362 STATE OF NEW YORK,
County of New York, ss.:

Clifford G. Ludvigh, being duly sworn, deposes and says that he is the complainant-appellant in this action; that he has read the foregoing petition and knows the contents; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

CLIFFORD G. LUDVIGH.

Sworn to before me this 2nd day of June 1911.

A. G. WILEY,
Notary Public, Queens Co.

Cert. filed in N. Y. Co.

363 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Clifford G. Ludvigh, as Trustee, etc., Complainant-Appellant, against American Woolen Co. & ano., Defendants-Appellants. Petition for appeal and order allowing same. James, Schell & Elkus, Attorneys for Complainant, Appellant. No. 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jun 9, 1911. William Parkin, Clerk.

364 United States Circuit Court of Appeals for the Second Circuit.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, Individually and as Co-partners Doing Business under the Firm Name of Phillip Horowitz & Son, Bankrupts, Complainant-Appellant,
against
AMERICAN WOOLEN COMPANY OF NEW YORK, and NIAGARA WOOLEN COMPANY, Defendants-Appellees.

Assignments of Error.

Comes now Clifford G. Ludvigh, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, individually and as co-partners doing business under the firm name of Joseph Horowitz & Son, bankrupts, appellant and plaintiff in error by Abram I. Elkus and Garrard Glenn, his counsel, in connection with a petition for appeal to the Supreme Court of the United States from the judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit, entered on May 19th, 1911, and says that in the record of proceedings in said United States Circuit Court of Appeals for the Second Circuit there is manifest error, and he makes and files the following assignments of error:

(1) That said Court erred in reversing the decree of the District Court finding that the complainant was entitled to recover from the defendants the sum of $52,668.19.

(2) That said Court erred in reversing said decree with
365 instructions to dismiss the bill with costs, said error being for failure to instruct that complainant be granted a new trial.

(3) That said Court erred in deciding that there was no actual fraud on the part of the defendants, or either of them.

(4) That said Court erred in deciding that the arrangement between the bankrupts and the defendants, under which woolens were delivered by the American Woolen Company at the bankrupts' place of business was not, as against the creditors of the bankrupts, an absolute sale of the woolens in question by the American Woolen Company to the bankrupts.

(5) That said Court erred in construing the arrangement between the bankrupts and the defendants, under which woolens were delivered by the American Woolen Company at the bankrupts' place of business as allowing merchandise on hand during the continuance of the agreement to be accounted for by the fact that it was on hand.

(6) That said Court erred in deciding that the purpose of the organization and operation of the Niagara Woolen Company was merely that it should be a check on the transactions of the bankrupts and a depository for all cash received by the bankrupts from the sales of woolens delivered by the American Woolen Company.

(7) That said Court erred in deciding that it was the purpose of the defendants and the bankrupts honestly to make a consignment or factorage agreement.

(8) That said Court erred in deciding that under the arrangement between the bankrupts and the defendants all goods delivered by the American Woolen Company were to be sold by the
366 bankrupts at not less than the invoice price and that the proceeds were to be turned over at once to the American Woolen Company.

(9) That said Court erred in deciding that the arrangement between the bankrupts and the defendants, under which woolens were delivered by the American Woolen Company, whether regarded as a consignment or as a conditional sale, of such woolens, was entirely legal as against the bankrupts' creditors.

(10) That the said Court erred in finding that the said arrangement between the bankrupts and the defendants was valid as against creditors, notwithstanding that credit is given in reliance upon the apparent ownership of the merchandise in possession of the vendee.

(11) That the Court erred in failing to find that the presumption that credit was extended to the bankrupts because of the apparent ownership of woolens in their possession was applicable to the case, and required a finding that the arrangement was fraudulent as a matter of law, against creditors.

(12) That said Court erred in refusing to hold that the arrangement between the bankrupts and the defendants under which woolens were delivered by the American Woolen Company, was really a contract of sale under which the American Woolen Company was the vendor and the bankrupts were the real vendees, and that although title to all goods delivered by the vendor was to remain in it until paid for yet the vendee was allowed to consume the goods, or sell them and apply the proceeds in whole or in part to their own use.

(13) That said Court erred in deciding that the arrangement between the defendants and the bankrupts under which woolens
367 were delivered by the American Woolen Company did not permit the defendant to apply part of the proceeds of the sales of all goods to defraying the expenses of the bankrupts' business.

(14) That said Court erred in not deciding that the plan, device and arrangement and the actings and doings of the defendants, as allowed in the bill and as appearing on the proofs, were and are as matter of law in fraud of the rights of the creditors, and each of them, whose claims were duly proven and allowed against the Estate of said bankrupts.

(15) That said Court erred in not deciding that the removal and disposal by the American Woolen Company of New York of the 760 pieces of woolen mentioned in the bill constituted and was as matter of law in fraud of the aforesaid creditors of said bankrupts and was and is void in pursuance of the Bankruptcy Act, of 1898 and the amendments thereto.

(16) That said Court erred in not deciding that the complainant as Trustee of the estate and effects of the aforesaid bankrupts is entitled to the aforesaid property and all of it, to wit, 760 pieces of woolens described in the bill, or the value thereof, as the same existed on October 26, 1904, to wit the sum of $39,685.27, together with the interest thereon at the lawful rate from October 26, 1904, and costs.

(17) That said Court erred in deciding that the arrangemer
between the bankrupts and the defendants, under which woole
were delivered by the American Woolen Company was wholly i
cluded in the two agreements of November 25, 1902, between t
American Woolen Company and the Niagara Woolen Co
368 pany, and between the American Woolen Company, t
bankrupts, and J. P. Murphy.

(18) That said Court, in ascertaining the nature and term
the arrangement between the defendants and the bankrupts, und
which woolens were delivered by the American Woolen Company
erred in not taking into consideration the contemporaneous agre
ment between Philip Horowitz and the Niagara Woolen Company
under which, Horowitz agreed to bear all the expenses of the Niaga
Company's business in consideration of $1,200, a month to be pai
him out of the profits derived from the sale of woolens delivered b
the American Woolen Company.

(19) That said Court, in ascertaining the nature of the arrang
ment between the bankrupts and the defendants, under whic
woolens were delivered by the American Woolen Company, erre
in not taking into consideration the communication and dealing
of the bankrupts with the American Woolen Company, which est
lished that the parties considered the arrangement as one whereb
the woolens were sold by the American Woolen Company to th
bankrupts for fixed prices, and the bankrupts were allowed to se
the goods at whatever prices they please, being bound to pay th
American Company only the aforesaid fixed prices.

(20) That said Court, in ascertaining the nature of the arrange
ment between the bankrupts and the defendants, under whic
woolens were delivered by the American Woolen Company to th
bankrupts, erred in not taking into consideration the fact that th
Niagara Woolen Company had no independent existence, but wa
created merely in order that the American Woolen Company coul
sell woolens to the bankrupts in such a way as to defraud th
369 latter's creditors in the event of their bankruptcy.

By reason of the above assignments of error your petitioner
prays that the said mandate and judgment of the United States Cir
cuit Court of Appeals for the Second Circuit be reversed, and tha
the decrees of the United States District Court for the Southern
District of New York, entered on or about the 8th and 11th days o
March, 1910, respectively, be affirmed; and that the proceedings be
remanded to said District Court, with the direction that the said
District Court enter its decree adjudging that the aforesaid transac
tions between the defendants and the bankrupts be deemed to be
fraudulent, and that your petitioner as Trustee recover from the
defendants the sum of $52,668.19, and interest thereon from March
11th, 1910, and costs of appeal, or, in the alternative, that said pro
ceedings be remanded to said District Court with the direction that
the said cause be re-tried with costs to abide the event.

Dated, New York, May 31st, 1911.

CLIFFORD G. LUDVIGH,
As Trustee, as Aforesaid, Complainant-Appellant.

ABRAM I. ELKUS AND
GARRARD GLENN,
Of Counsel.

370 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. Clifford G. Ludvigh, as Trustee, etc., Complainant-Appellant, against American Woolen Co., & ano., Defendants-Appellants. Assignment of Errors. James, Schell & Elkus, Attorneys for Complainant, Appellant, No. 170 Broadway, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 9, 1911. William Parkin, Clerk.

371 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 370 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Clifford G. Ludvigh, as Trustee, etc., Complainant-Appellant, against American Woolen Company of New York, and another, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of June, in the year of our Lord One Thousand Nine Hundred and eleven, and of the Independence of the said United States the One Hundred and thirty-fifth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

372 By the Honorable Henry G. Ward, Circuit Judge, one of the Judges of the United States Circuit Court of Appeals, Second Circuit.

The President of the United States to the American Woolen Company of New York and Niagara Woolen Company, Greeting:

You are hereby cited and admonished to appear before the Supreme Court of the United States to be held in Washington, District of Columbia, on the 6th day of July, 1911, pursuant to an appeal from the judgment and mandate of the United States Circuit Court of Appeals for the Second Circuit, made on the 19th day of May, 1911, reversing the decrees of the United States District Court for the Southern District of New York, made on or about the 8th and 11th days of March, 1910, respectively, adjudging that Clifford G. Ludvigh as Trustee in Bankruptcy of the estate and effects of Phillip Horowitz and Joseph Horowitz, individually and as co-partners doing business under the name of Phillip Horowitz & Son, bankrupts recover from you the sum of $52,668.19; in which appeal the said Clifford G. Ludvigh, as Trustee in Bankruptcy as aforesaid is the appellant and you are appellees, then and there to show cause, if any there be, why the said judgment and mandate of the said United

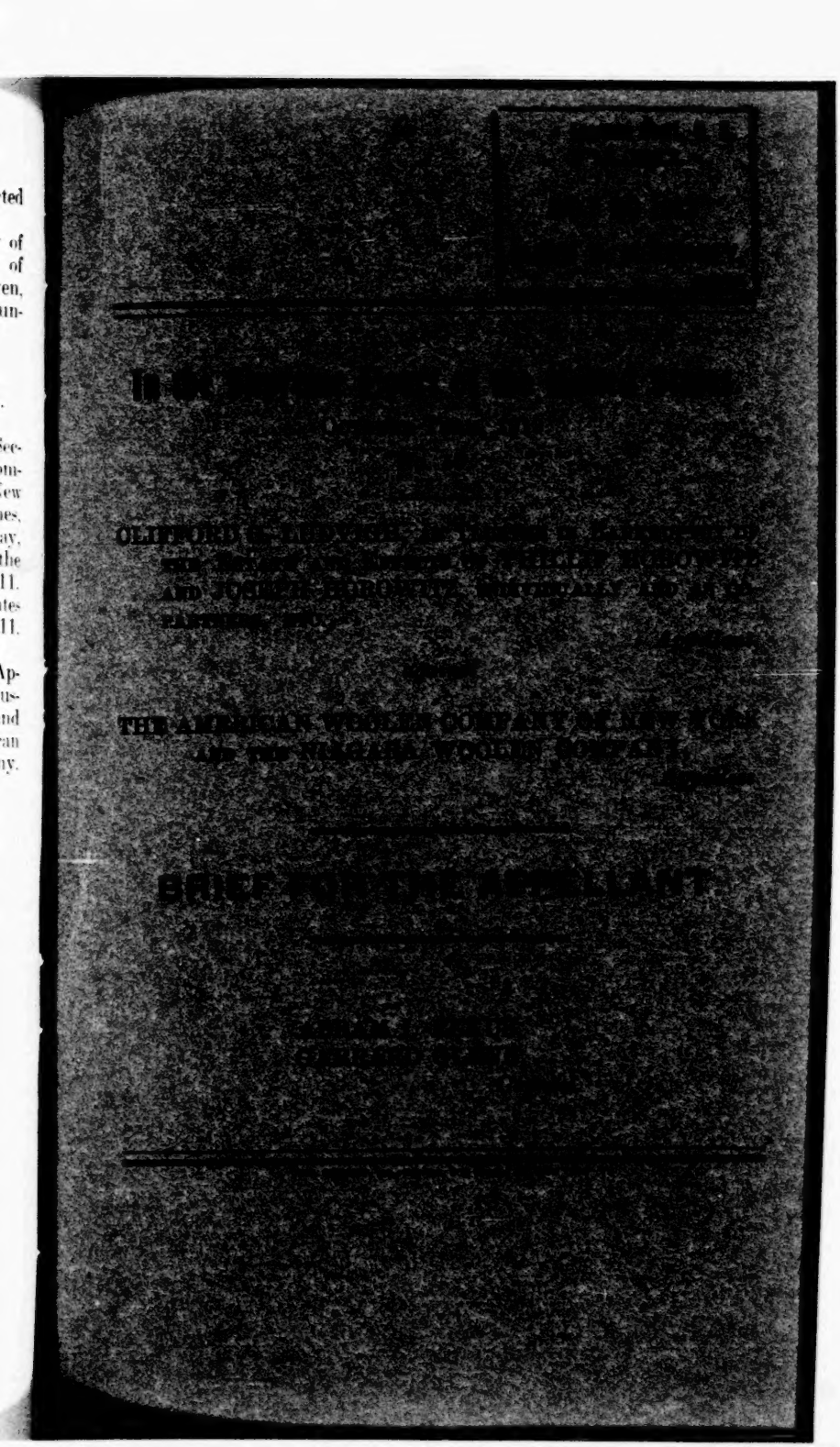
States Circuit Court of Appeals should not be reversed and corrected and why speedy justice should not be done in that behalf.

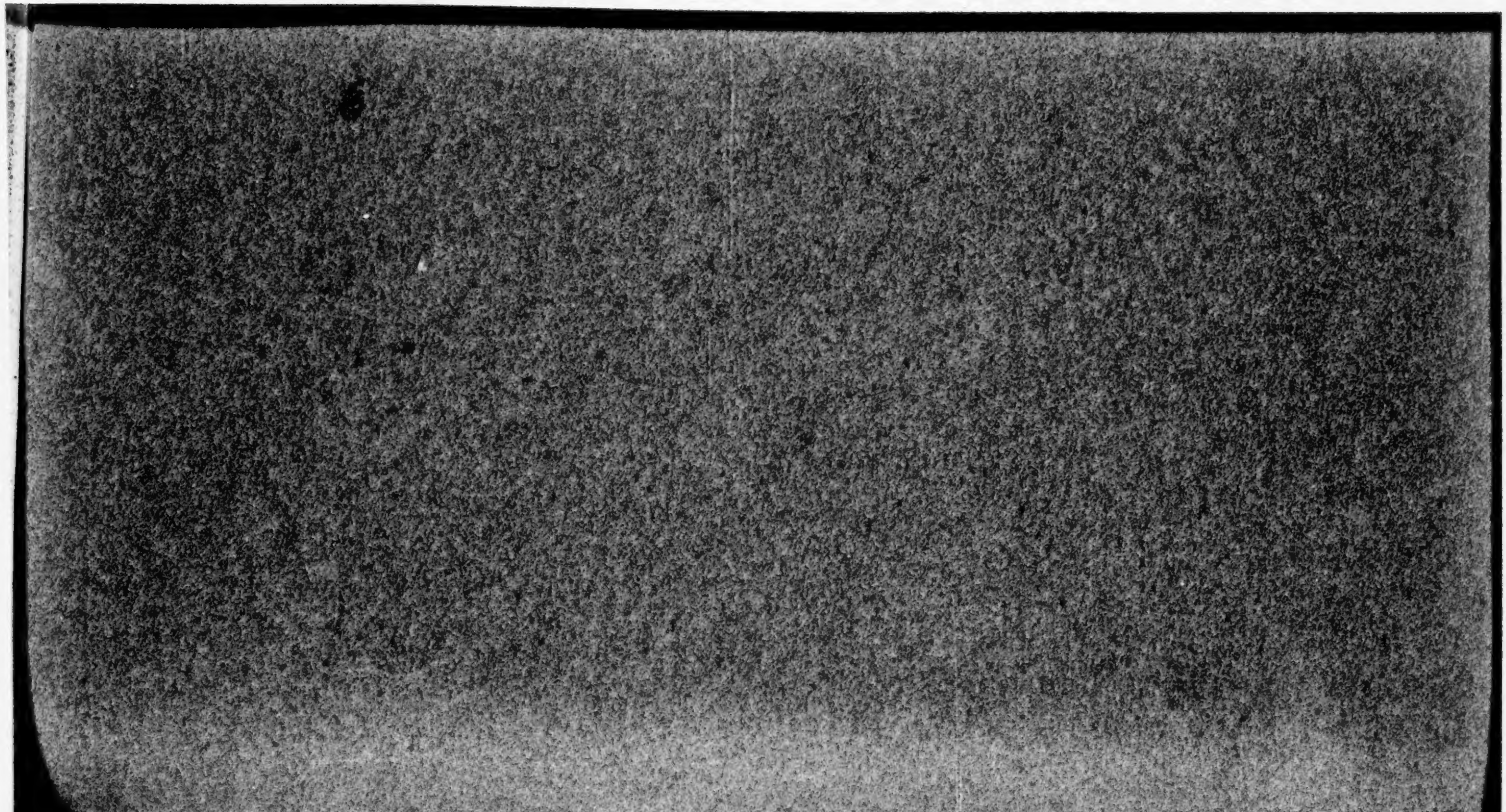
Given under my hand and the Seal of said Court in the City of New York, in the Southern District of New York this 7th day of June, in the year of our Lord one thousand nine hundred and eleven and of the Independence of the United States the one hun-
373 dred and thirty-fifth.

H. G. WARD,
One of the Judges of the United States Circuit Court of Appeals for the Second Circuit.

374 [Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. Clifford G. Ludvigh, as Trustee, etc., Complainant-Appellant, against American Woolen Company of New York, and ano., Defendants-Appellees. Original. Citation. James, Schell & Elkus, Attorneys for Comp.-Appellant, No. 170 Broadway, Borough of Manhattan, New York City. Service of a copy of the within is hereby admitted. Dated, New York, June 9, 1911. Hays, Hershfield & Wolf, Attorney- for Respondent. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 12, 1911. William Parkin, Clerk.

Endorsed on cover: File No. 22,800. U. S. Circuit Court Appeals, 2nd Circuit. Term No. 724. Clifford G. Ludvigh, as Trustee in Bankruptcy of the estate and effects of Phillip Horowitz and Joseph Horowitz, individually, &c., Appellant, vs. The American Woolen Company of New York and The Niagara Woolen Company. Filed July 15th, 1911. File No. 22,800.





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IN THE

Supreme Court of the United States.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, individually and as copartners, etc.,

Appellant,

against

THE AMERICAN WOOLEN COMPANY OF NEW YORK and the NIAGARA WOOLEN COMPANY,

Appellees.

October Term,
1913.
No. 55.

BRIEF FOR THE APPELLANT.

This is an appeal from a judgment of the United States Circuit Court of Appeals for the Second Circuit, reversing a decree of the District Court for the Southern District of New York, which latter adjudged that the complainant recover from the defendants $52,668.19 (Rec., p. 229).

The action was brought by the Trustee in bankruptcy of Philip Horowitz & Son, of New York City, to recover

the value of goods alleged to have been taken by the defendant in fraud of creditors. The District Court after a trial found for complainant (Rec., pp. 32, 35). The Court of Appeals for the Second Circuit reversed the judgment below and directed that the bill of complaint be dismissed.

So far, the record shows an even division of judicial opinion on this case. Of the three judges composing the Circuit Court of Appeals two concurred for reversal, the presiding Judge dissenting and concurring in the decision of the Court below.

The Facts.

The facts were substantially undisputed in both Courts below.

On October 31, 1904, a bankruptcy petition was filed in the Southern District of New York against Phillip and Joseph Horowitz, individually and as copartners doing business under the name of Phillip Horowitz & Son. An adjudication followed on January 26th, 1905, and thereafter the plaintiff was appointed their trustee in bankruptcy and qualified (Rec., p. 41).

The Bankrupts.

The firm of Phillip Horowitz & Son had been doing business in New York City since the year 1900. The partnership was composed of Phillip Horowitz and his son, Joseph Horowitz. The latter retired from the partnership in May, 1904 (Rec., pp. 58, 82), but, as no formal announcement of his retirement had been made, he

nominally continued as a partner and was adjudged a bankrupt with his father. This firm dealt in woolens and silks, and throughout its business career it purchased from a number of different concerns, including the American Woolen Company (Rec., pp. 78, 79, 58, 59, 84, 88, 89).

Early dealings with American Co.—the Horowitzes at first bought woolens from it.

The American Woolen Company was formed in 1901 (Rec., p. 41). Horowitz & Son bought merchandise from this concern among others, and had an annual credit with it in the neighborhood of $40,000 or $50,000 (Rec., pp. 59, 89, 85). It had previously bought from concerns which joined to form the American Woolen Company.

An Agreement of 1901, Preceding the Arrangement in Question.

In Novemher, 1901, the first formal agreement was made between the Horowitz firm and the American Woolen Company (Rec., pp. 59, 141, Plaintiff's Exhibit 1).

In substance this agreement is identical with the agreement which is in issue in this action, with certain differences which will be pointed out in the following argument. It is sufficient to say that the doubts entertained by the Woolen Company's counsel as to the legal effect of this agreement caused what Judge Hough describes as the "apparatus of contracts" about to be mentioned.

The Circumstances Preceding the Agreements in Suit.

Two witnesses testified as to the circumstances surrounding the making of these agreements, *and their testimony is not disputed.* They are Joseph Horowitz, one of the bankrupts, and David J. Gallert, who was then of counsel for the American Woolen Com-Company (Rec., pp. 47, 48, 50, 59). Mr. Gallert's firm of Gallert & Heller never had been the attorneys for the Horowitzes (Rec., pp. 59, 48). The whole scheme which was then planned and carried out was the work of the American Woolen Company. The Horowitzes suggested nothing, but simply did as they were told by the American Woolen Company.

The matter opened with a conversation between Mr. Murphy, the credit man of the American Woolen Company (Rec., pp. 43, 44), and Joseph Horowitz. The latter testifies that, he happening to be in Mr. Murphy's office, Murphy said :

> " That he would prefer to have Phillip Horowitz & Son incorporated under some corporation, under some name * * * and I asked him the reason why he wanted it that way and he said that he had no special reason except that the American Woolen Company would prefer to have it that way. * * * I don't believe on that occasion anything was said more than that he would like to have Phillip Horowitz & Son a corporation " (Rec., p. 62).

Horowitz then talked the matter over with his father (Rec., p. 62). Then both the Horowitzes saw Murphy.

> " Mr. Murphy explained at the time to both of us

that the American Woolen Company, that is, the Boston office, Mr. Woodhull, wanted to have Phillip Horowitz & Son incorporated, and he gave us no reason except that they wanted it that way, and father and myself told him that we had no objection. We then told him that we wouldn't agree to go to the expense of incorporating. Mr. Murphy answered that that would be all right, he would refer us to his attorneys, Mr. Gallert, of Gallert & Heller, and that was the whole conversation at the time" (Rec., pp. 62, 63).

The acquiescence of the Horowitzes in this scheme is fully explained by the rest of the conversation :

> "Q. Was anything said at that time with reference as to how business was to be done with this new corporation? A. It was to be done in the same way [as Phillip Horowitz & Son] Mr. Murphy remarked at the time" (Rec., p. 63).

Murphy then said that he also wanted a sign on the door of the Niagara Woolen Company (Rec., p. 63), and that he would like to have two men of his office as directors and either one or the other of the Horowitzes could be president (Rec., pp. 66, 67), and that the Horowitzes must guarantee all accounts and deposit certain securities for faithful performance of the contract and for security in case of losses (Rec., p. 67).

He also said "that the prices, of course, would be the same prices that we were to pay regularly, thus according to the prices that are agreed with the department" (Rec., p. 68). "Mr. Murphy said I was to get the goods at the price I bought same as before and sell them for any prices I pleased, and that whatever I

would get above the price-list price would be my profit" (Rec., pp. 67, 68).

Then Horowitz and his father went to see Mr. Gallert (Rec., p. 62). Following their conversation, the Niagara Woolen Company was incorporated (Rec., p. 63).

THE OBJECT OF THE ARRANGEMENT,—TO CIRCUMVENT THE DECISION IN IN RE GARCEWICH (115 Fed., 87).

Before that, however, we should notice a letter from Mr. Gallert to Horowitz & Son, dated June 18th, 1902, which acknowleged receipt of a draft mortgage made by Phillip Horowitz and wife to the American Woolen Company. It then contains the following language (Plaintiff's Exhibit 2, Rec., p. 143):

> "As we now understand, you desire that some scheme shall be carried out by which the name of the American Woolen Company of N. Y. will not appear on the record. We believe that the execution of this plan of yours will call for the solving of many legal questions, and inasmuch as some of these questions may not be easy we do not believe that it is possible for any one attorney to protect both your interests and those of the American Woolen Company of N. Y. * * * We have spoken to Mr. Murphy on this subject and he takes the same view of this question" (Rec., p. 143).

Prior to this letter the decision in *In re Garcewich* (115 Fed., 87) had come down. This decision will be discussed in the argument hereafter. The head-note is as follows:—"Under Bankruptcy Act, § 70 * * *, where goods were sold to the bankrupt on credit and with the understanding that the title to such of them as

should not be sold by him should remain in the vendor until the payment of the purchase price, the title thereto vests in the trustee." Mr. Gallert read this decision soon after it was announced (Rec., p. 46). On being asked to explain what he meant by a scheme in which the name of the American Woolen Company should not appear on record, he answered, "I can only answer that by my belief gained by my experience, if you desire that" (Rec., p. 57). Judge Hough says that this scheme "was deemed but a legal substitute for the consignment agreement of 1901, as to which the Woolen Company's counsel had grown doubtful" (Rec., p. 212).

This letter was written to Horowitz, as Mr. Gallert testifies, before he had had any conversation with him (Rec., p. 57). Although his letter spoke of the Horowitzes desiring that this scheme be made, the witness finally says that the matter was first taken up with him either by Mr. Murphy or Mr. Freedman of the Woolen Company (Rec., p. 57), and he had no conversation with Horowitz before reading that letter (Rec., p. 57). It is also clear that Mr. Gallert declined to act as counsel for the Horowitzes because he was counsel for the American Woolen Company (Rec., p. 48). He does not recollect seeing the Horowitzes until the time of the incorporation (Rec., p. 49). His instructions were from Mr. Murphy and Morse & Freedman, of Boston, who were the general counsel for the Woolen Company (Rec., p. 49).

Organization of the Niagara Company.

As a result of all this the Niagara Woolen Company was incorporated on November 11th, 1902, and certain agreements were thereupon made. All of these agreements and corporation papers were prepared by counsel for the American Woolen Company (Rec., pp. 106–108, 109, 110, 50, 51, 53, 54).

The Niagara Woolen Company was incorporated under the laws of New York in November, 1902, with a capital stock of $20,000. The object of its incorporation was "to contract and deal with the American Woolen Company of N. Y. and to deal in fabrics received therefrom" (Rec., p. 153). The original subscribers and first directors were Joseph Horowitz, George H. Dane and Robert J. Hanlon (Rec., p. 154). Dane and Hanlon were employees of the American Woolen Company (Rec., p. 41). The By-laws of the company contained the following:

> "The Board of Directors shall have no power to contract liabilities for merchandise with any individual, person or corporation other than the American Woolen Company of N. Y." (Rec., p. 156).
> "The president * * * shall have no power to make contracts for the purpose of merchandise from any other person, individual or coporation than the American Woolen Company of New York" (Rec., pp. 157-157, 98)

These provisions should be compared with the following clause of the agreement of 1901: "The parties of the first part (Horowitz) further agree to buy no woolens except from the American Woolen Company of N. Y." (Rec., p. 142).

The Contracts.

At a meeting of the incorporators of the Niagara Woolen Company Phillip Horowitz offered to execute a mortgage on certain real estate he owned at Nos. 54 and 56 Eldridge street for $19,500 at 4% in return for 195 shares of the capital stock of the Niagara Company. This offer was accepted and the stock accordingly issued (Rec., p. 160). Then Horowitz offered to bear all the expenses of doing business in behalf of the corporation in consideration of $1,200 a month, to be paid out of its earnings. This offer was also accepted (Rec., pp. 160, 161, 169).

Then an agreement was made between the American Woolen Company and the Niagara Woolen Company. Under this the American agreed to deliver to the Niagara from time to time such merchandise as it in its judgment should see fit, and the Niagara agreed to accept possession of all such merchandise and to care for the same as the property of the American, it being expressly understood that the title to the merchandise should always be vested in the American and subject to its direction and control (Rec., pp. 13-14). The title to such merchandise should pass directly from the American to such person or persons to whom it should be sold by the Niagara (Rec., p. 14). The Niagara agreed to sell this merchandise to such persons as it should judge to be of good credit and business standing and to collect all accounts receivable representing such sales, and immediately pay over to the American any amount collected, minus the difference between the price at

which the merchandise had been invoiced by the American to the Niagara and the price at which the merchandise had been sold (Rec., pp. 13-14).

The Niagara also guaranteed the payment of all accounts receivable representing sales of goods, and further agreed, if any merchandise should not be accounted for, as hereinabove provided, to pay to the American the invoice price of the merchandise, and thereupon title thereto or the proceeds thereof should pass to the Niagara and be exempted from the provisions of the agreement (Rec., 13-14). It was further provided that the invoices given by the American to the Niagara shall be subject "to the usual trade discounts of the American Woolen Company of N. Y." (Rec., p. 14). The Niagara also agreed that "it will not during the continuance of this agreement engage in the merchandising in any manner of any fabrics, except as herein provided." The agreement was to continue for one year. If, however, it should terminate all of the merchandise should be immediately returned to the possession of the American (Rec., p. 14), and any breach by the Niagara should terminate the agreement (Rec., p. 14).

At the same time an agreement was made between the American Woolen Company, the Horowitzes and Jeremiah Murphy (Rec., p. 15). By this agreement the Horowitzes guaranteed to the American Woolen Company the performance of the Niagara agreement (Rec., p. 15). As security for this agreement the Horowitzes trusteed with Murphy their stock of the Niagara, amounting to $19,700 par value (Rec., pp. 15-16).

At the same time the mortgage on the Eldridge street premises was drawn by Mr. Gallert and executed (Rec., pp. 53-54).

The fees of Gallert & Heller in this matter were partly paid by the Horowitzes and partly by the American (Rec., pp. 54, 55, 56, 90-91, 110-111, 140).

Intermingling of goods—negative character of the Niagara.

At the Horowitzes' place of business the merchandise of the American Woolen Company was not segregated. It was, to quote Joseph Horowitz, "all around the store and also in the basement" (Rec., p. 60). None of it was kept separate. All woolens and silks, whether received from the Niagara or from other sources, were put together on shelves without any discrimination (Rec., pp. 61, 91).

The defendants' witness, Thomas E. Dawber, an employee of the American Woolen Company, on his direct-examination testified that the American Woolen Company's goods had tickets attached by which the identity of the goods could be discerned by anyone passing through the store (Rec., pp. 104-106). On cross-examination this witness, after admitting that these tickets did not always hang out but often were tucked into the bolts so that the woolens cannot be distinguished (Rec., p. 111), finally admitted that he could not swear that all the woolens or the majority of them that he saw there had tickets showing they came from the American Woolen Company or

that he saw the tickets (Rec., p. 112). Finally, all this witness will swear is that the entire floor of the store was taken up with goods of some description (Rec., pp. 113-114).

There was no partition in the store of Horowitz & Son. In the back there was a partition, making three office rooms. There was no sign distinguishing these various rooms. One of these offices was used for the books of the Niagara Company, the next office was used for the books of the Horowitze's business and the third was the credit office (Rec., p. 60). At the street entrance the sign of the Niagara Woolen Company was placed underneath the sign of Philip Horowitz & Son, the latter being the larger (Rec., p. 63).

The business methods continued exactly the same under the Niagara arrangement; there was no difference in the selling of the merchandise (Rec., p. 64). there was no difference in the way the goods were shipped (Rec., p. 64); there was no difference in the way the goods were kept in the store—they were still mingled with the goods of the Horowitzes (Rec., p. 64).

The Niagara Company was nothing but a name on the door. Horowitz & Son made no attempt to push trade in the name of the Niagara (Rec., 74), nor did Dawber, the American's representative (Rec., 79). All sales were made by and in the name of Phillip Horowitz & Son (Rec., p. 75). Horowitz & Son employed and discharged all salesmen and paid all the expenses of the business (Rec., p. 74). Although minutes of a number of pretended meetings are in evidence, all of which

were drawn by the attorneys for the Woolen Company. Joseph Horowitz very positively testifies that he never attended any meetings, and as far as he knew no meetings were ever held (Rec., pp. 78, 79, 80, 81). No balance sheet was ever made up of business done (Rec., p. 77). The Niagara never declared a dividend and never accounted to the American (Rec., pp. 78, 115), and it is instructive that although this arrangement continued for nearly two years and there are "minutes" of the annual meeting of the stockholders held in 1903 (Rec., p. 171), no officers' reports were presented, either of the president or treasurer.

THE HOROWITZES SELECTED GOODS AND BARGAINED ABOUT THE PRICES.

The ostensible consignment agreement provides (Rec., p. 13) that the Woolen Company shall "deliver from time to time such goods, ware and merchandise as it, in its judgment, sees fit." This, however, was not the course of dealing by any manner of means. The American Woolen Company delivered such goods as the Horowitzes ordered, and none others. Joseph Horowitz testifies that before the formation of the Niagara, whenever the Horowitzes wanted goods, "we went up to the department and ordered goods there on order for the fall and spring and received them in due time. * * * The price was agreed upon * * * that we was to pay" (Rec., p. 64). After the formation of the Niagara the procedure was exactly the same. Horowitz says:

"I went up to the department and placed my

order and agreed to certain prices to be paid for the goods" (Rec., p. 65). "We selected the goods right there from the samples. * * * We agreed to the price. I asked the price, what price these goods were, and he said the price it was 1.47½ or 1.65, and we then agreed to the price and I placed my order and got a copy of the order" (Rec., p. 65).

This was by no means a formality. Horowitz testifies as follows :

"Q. You said in answer to his Honor's question that when the question of price came up you bargained about it; what did you mean about that? A. Just bargained about the price" (Rec., pp. 65-66).

DOCUMENTS ACCOMPANYING ORDERS AND DELIVERIES.

With each order a memorandum would be delivered (Rec., p. 65). Samples of such memoranda are in evidence (Plaintiff's Exhibit 6, Rec., p. 145). They take the shape of a letter by the Woolen Company to the Niagara Woolen Company, as follows :

"We herewith give you memorandum of your order for Spring 1903, as placed with us, etc." (Rec., p. 145).

Also, it is stated :

"This is accepted and consideration shall be given in accordance with the agreement had between us as of November 25th, 1902" (Rec., p. 145).

When the goods were delivered another memorandum came with them (Rec., p. 66), samples of which are in evidence (Plaintiff's Exhibits 7 and 8, Rec., pp. 146,

147). Although these memoranda state that "these goods are delivered on consignment by the American Woolen Company of N. Y. and accepted by the Niagara Woolen Company upon the express condition that the title thereto remain vested in the American Woolen Company of N. Y. until paid for," yet the other provisions of these orders are wholly inconsistent with the idea of a consignment.

In the first place the Woolen Company "reserves the right to manufacture these goods in any mill of its organization" (Rec., p. 146). Also should be noted that the name of the salesman of the American Company is always inserted, as "Salesman–Muldoon"(Rec., p. 146). Then is this significant provision : "No goods to be returned or allowance made for any cause after goods are sponged or cut. All terms of sale and deliveries are set forth in this copy of order" (Rec., p. 146). Also there were interest terms of discount in exactly the same way as if this were a sale, *e. g.*, "Terms 7/4–8/60," etc. (Rec., p. 146). Horowitz testifies that these terms of discount, as 7/4, means 7% would be allowed off the purchase price if it was paid in four months (Rec., p. 66).

CONTROVERSY OVER DISCOUNT RATES AND RETURNING GOODS.

The mention of these terms of discount leads to an equally significant line of facts. There are in evidence several letters from the American Woolen Company, addressed, some to Phillip Horowitz & Son and some to the Niagara Woolen Company.

On January 9, 1903, is a letter addressed to the Niagara Woolen Company requesting them to sign the agreement "relating to goods delivered off price" (Rec., p. 69). This, according to Horowitz, meant that so-called "second goods" were sold at 10% or 15% less than the goods of the first class (Rec., p. 70).

Thereupon an agreement was signed (Rec., p. 70) which is Plaintiff's Exhibit 12 (Rec., p. 148). In that agreement, the Niagara agreed to hold the American Woolen Company of N. Y. harmless "from any loss they may sustain by being obliged for any reason whatsoever to take back for *re-sale* (*sic*) any goods consigned or delivered to us at off prices" (Rec., p. 148).

Another agreement was also signed by the Niagara (Rec., p. 70), which is the Plaintiff's Exhibit 13 (Rec., p. 149). There the Niagara Company states that "in lieu of the American Woolen Company furnishing us with 1,000 pieces of this season's heavy weights at opening prices we wish to express ourselves as entirely satisfied with everything that has been done in connection with the charging and re-charging of certain goods consigned to us" (Rec., p. 149).

This agreement, though signed by the Niagara Company, had, however, been preceded by certain correspondence between Horowitz & Son and the American Company. Horowitz & Son "asked the American Woolen Company to allow us an extra 2% discount on merchandise that we bought" (Rec., p. 71). In answer, the Woolen Company wrote to Horowitz & Son (Rec., p. 71), stating that Mr. Woodhull would take the matter up on

his return (Plaintiff's Exhibit 14, Rec., 149). Later, the Woolen Company again wrote to Messrs. Horowitz & Son (Rec., p. 71), saying that they had taken the matter up with Mr. Woodhull, making an appointment with him for the following day (Plaintiff's Exhibit 15, Rec., p. 149). Horowitz then testifies that he kept this appointment with Mr. Woodhull and explained "that I ought to get 2% extra because the profit was so small, and that we would have to get it or I would have to discontinue business altogether" (Rec., p. 72). Thereupon Mr. Woodhull referred the matter to Mr. Murphy. Horowitz then called on Mr. Murphy, who wrote down on a piece of paper a memorandum of their agreement (Rec., p. 72). This is as follows:

> "Sales to be made on terms of 8/60 days; we accept payment on account of sales on average due date; interest to be charged. * * * Credit Phillip Horowitz & Son with 2% on net amount of of sales" (Plaintiff's Exhibit 16, Rec., p. 150).

Accordingly, at a pretended meeting of stockholders of the Niagara Company, held on November 17, 1903, it was voted to arrange with the Woolen Company for the renewal of the contract, with a modification as follows:

> "All invoiced prices referred to in paragraph 4 of said agreement shall be subject to a discount of 8% if the Niagara Woolen Company turns the amount of the invoices over to the American Woolen Company of N. Y. within sixty days from sale by the Niagara Woolen Company of the merchandise covered by said invoices, and said invoice prices are to be subject in that event to a further discount of 2% after

> the 8% discount has been deducted. On all invoices, the amount which is not turned over to the American Woolen Company of N. Y. within sixty days of sale by the Niagara Woolen Company of the merchandise covered by said invoices, the Niagara Woolen Company hereby agrees to pay the American Woolen Company of N. Y. interest at the rate of 6% after the expiration of sixty days from the date of the sale of such merchandise by said Niagara Woolen Company, said renewal to extend from the 25th day of November, 1903, to the 25th day of November, 1904" (Rec., pp. 89–90, 171–172, 173).

Accordingly the contract between the Niagara Woolen Company and the American Woolen Company, which, by its terms, was to expire in November, 1902, was renewed with this modification (Rec., p. 19).

Also is in evidence a letter by the American Woolen Company, addressed to Mr. Joseph Horowitz, as President of the Niagara Woolen Company (Rec., p. 73), which states as follows:

> "We cannot at this late date consent to have thrown back into our stock Fall goods which were made expressly for you and delivered in accordance with the terms of the agreement" (Plaintiff's Exhibit 17, Rec., p. 150).

Goods charged without delivery.

It also appears by the testimony of the defendants' witness, Hartough, that the American Woolen Company charged to the account of the Niagara goods which had never been delivered, but were kept in the American Woolen Company's warehouse until Horowitz & Son required delivery (Rec., pp. 136, 137).

THE AFFAIRS OF THE NIAGARA WERE UNDER THE HOROWITZES' CONTROL.

Thomas E. Dawber, who was then employed by the American Woolen Company (Rec., p. 100), was made secretary and treasurer of the Niagara Woolen Company (Rec., p. 100). He called at the Horowitzes' place of business daily (Rec., pp. 68, 77). He would stay about a half hour or twenty minutes (Rec., p. 68). He "used to have conversations with the bookkeeper regarding the accounts, look through the cash book and check book and see what accounts were overdue, if any, make a general inspection in a short time" (Rec., pp. 100–101). "I looked over the ledger on my own account, and Mr. Hartough would call my attention to the different transactions that had been made, and I would look over the cash account and draw a check, if there was any funds to be drawn out" (Rec., p. 114). But the checks required two persons' signatures, viz., those of Horowitz and Dawber, and Dawber could not draw a check without the signature of Horowitz (Rec., p. 114).

At first the books were kept by Horowitz's own bookkeeper (Rec., pp. 95, 133). About six or eight months after the incorporation of the Niagara (Rec., p. 133), a bookkeeper named Hartough was installed to keep the books of the Niagara Company. Hartough's salary was paid by the American Woolen Company (Rec., p. 68). He was there all day (Rec., p. 77), but his work consisted of nothing more than "the charging of merchandise and entries" (Rec., p. 83). After Har-

tough came he copied the old entries of Horowitz's bookkeepers, and started on the basis of entries made by them (Rec., p. 133).

THE NIAGARA BUSINESS ENTIRELY CONTROLLED BY THE HOROWITZES.

But these books were kept in the safe of Phillip Horowitz & Son, together with their books, papers and insurance policies, Horowitz alone had the key, and Hartough could not get into it (Rec., p. 122).

In making entries in the books Hartough had to depend entirely upon the Horowitzes for information. He made all of his entries from memoranda given him by the Horowitzes (Rec., p. 122).

> "Q. So what you did with reference to making the entries in these books of sales came through the Horowitzes and no one else? A. Yes. Q. And as far as entries were concerned, you looked to them for the substance of these entries? A. Yes. Q. The precise terms and everything else was fixed by them? A. Yes" (Rec., pp. 122-3).

The Horowitzes attended to making up and delivering the bills and collecting the accounts. All Hartough did was the clerical work of filling out the bills (Rec., pp. 122, 123).

All mail addressed to the Niagara was opened by the Horowitzes. Whenever checks came with bills they received them first, and they handed Hartough the information to post through his books (Rec., p. 123).

When checks were deposited to the credit of the

Niagara Company the deposit slips were made out by the Horowitzes and not always in the presence of Hartough (Rec., p. 124). All deposits were made by the Horowitzes (Rec., p. 125) All endorsements of checks for the purpose of deposit were made by them (Rec., p. 126).

The billing of goods was thus explained by Joseph Horowitz in answer to the Court's questions :

> "We had woolens belonged to Phillip Horowitz & Son; we handled woolens as well outside the Niagara Woolen Co. goods, outside of the American Woolen Co.'s goods, and the customers who bought goods they bought two bills, they bought a bill of silks and woolens from Phillip Horowitz & Son, also bought a bill of goods of American Woolen Co.'s goods which were billed extra on Niagara Woolen Co. bills. Now some of the customers and some of the manufacturers they did not care how they sent in the check but they took the two bills together; *they knew they were buying from Phillip Horowitz & Son;* the Niagara did not have a trade name or cloak trade as the Niagara; the arrangement between us was that when they made a check out to Phillip Horowitz & Son, not what I say or did on certain occasions—certain transactions—they made out checks to Phillip Horowitz & Son for both bills, both the Niagara and for Phillip Horowitz & Son.
>
> Q. *By the Court*—Now you have detailed a sample incident which explains why a purchaser would send in one check; so far you know, did it ever happen that a person who bought from you only goods obtained from the American Woolen Company .and who received from you only a bill in the name of the Niagara Woolen Company send in a check drawn to Phillip Horowitz & Son ? A. Yes, sir.
>
> Q. That did happen ? A. Yes, sir; that did happen " (Rec., pp. 75, 76).

When a check thus came in to Phillip Horowitz & Son it was deposited in their bank account (Rec., pp. 73, 74). When a check came in to the order of the Niagara it was deposited in the Niagara account (Rec., p. 74). When a check came in to Horowitz for a double purchase, as above described, Horowitz would deposit it and then draw his own check to the Niagara account (Rec., p. 76).

The money that thus went into the Niagara account, however, was not paid over to the American as and when received, as the nominal agreement provided (Rec., pp. 13-14). On the contrary from time to time payments in round amounts were made to the American (Rec., p. 74), but always so as to leave a balance of between $1,000 and $1,500 (Rec., p. 74). At the same time Horowitz drew $1,200 a month from the same account (Rec., p. 77).

Hartough testifies that auditors of the American Woolen Company came every one or two months to examine the books (Rec., p. 120). But as we have already seen, all the information which they could get from these books in reality originated with the Horowitzes (Rec., pp. 122, 128, 129). Dawber, who was treasurer of the company, admits that he never presented a report as treasurer and that the interest and discounts were never calculated (Rec., p. 115). Although he was treasurer of the Niagara he admitted that he could not tell from its books how much was owing in October, 1904, to the American Woolen Company (Rec., p. 115). Hartough finally admits that

"there was nothing to prevent the Horowitzes or

any salesman of theirs from selling Niagara Woolen Company goods as their own, not telling him anything about it and pocketing the proceeds" (Rec., pp. 128, 129).

"Q. But you had to depend on the Horowitzes for the accuracy of the information which they gave? A. Yes" (Rec., p. 129).

The Horowitzes closed their place on Saturdays and Jewish holidays; and so did the Niagara close its "office" on those occasions, though the American, its putative parent, always remained open (Rec., p. 124).

The Collapse.

In May, 1904, Joseph Horowitz ceased to take any active part in the business (Rec., pp. 78, 79). He "went to Murphy and told him I was going out of business; it would not pay me to stay there" (Rec., p. 79).

"He asked me if I am going out of the business of Phillip Horowitz & Son and I told him yes" (Rec., p. 79).

Murphy thereupon had him sign a resignation as president and director of the Niagara (Rec., p. 79). But though he attended no meeting (Rec., p. 78) yet minutes were drawn up of a pretended meeting of the directors of the Niagara (Rec., p. 174). At this meeting Horowitz's resignation was accepted and Phillip Horowitz was elected president in his place (Rec., p. 174).

Then Phillip Horowitz commenced the practice of endorsing the Niagara checks and depositing them in his own name in his own bank account (Rec., pp. 92-93).

During this time Dawber testifies that he inquire about these overdue accounts. He testifies that Hore witz did not inform him that he had collected any o these accounts (Rec., pp. 104, 105). David Horowitz who continued in the employ of Horowitz & Son, testi fies, however, that Dawber asked him about one ac count, to which his father replied that he had a right t use the check received on that account because he had not drawn his $1,200 a month for some little time and had given a mortgage which he thought was good enough security (Rec., p. 93). Dawber denies that this conversation occurred (Rec., p. 105). However that might be, this course of dealing of Horowitz continued until on October 26, 1904, a fire occurred (Rec., p. 119). Phillip Horowitz disappeared after the fire and has never been seen or heard of since (Rec., pp. 107, 125, 126).

The American retakes the goods.

Then the American Woolen Company proceeded to take action. The first thing they did was to send men who took away from Horowitzes' place of business all the woolens which belonged to the Niagara Woolen Company (Rec., p. 91). The amount and value of these woolens is admitted (Rec., p. 42). Then a pre tended meeting of the directors of the Woolen Com pany was held on November 2, 1904 (Rec., p. 176). At that meeting it was recited that Phillip Horowitz had abandoned the property of the company and otherwise failed to perform the duties of president and he was removed from his office (Rec., p. 177). Robert J.

Hanlon was then elected as president to succeed Horowitz (Rec., p. 177). From that time on, so far as known, the Niagara Woolen Company has transacted no business. Nor has it apparently had any meetings since that time. The minutes put in evidence (Defendants' Exhibits A-T, Rec., pp. 153-176) are all of the minutes of the company (Rec., pp. 113-114). The last of these meetings was held on November 2, 1904, a few days after the flight of Phillip Horowitz.

The American also makes a large profit.

Then a foreclosure suit was instituted, ostensibly and in behalf of the Niagara Woolen Company, upon the mortgage for $19,500, which Horowitz had executed. Before judgment was reached, however, this mortgage, as the counsel for the defendant states, "was purchased from the Niagara Woolen Company by a third party for $12,500, which the Niagara Woolen Company subsequently paid over to the American Woolen Company" (Rec., pp. 98–99). The facts in evidence, however, are that this money went direct to the American Woolen Company and never passed through the hands of the Niagara Woolen Company (Rec., pp. 115, 116). The American Woolen Company also has all of the stock of the Niagara Woolen Company formerly owned by Horowitz (Rec., pp. 99–100). Not only that, but it also realized from the Horowitzes, between July and October of 1904, the total amount of $25,000 (Rec., p. 42). It has also, in the Niagara's name, recovered judgment against the Pacific Bank for the full amount of

Philip Horowitz's so-called forgeries (Defendant's Exhibit Y, Rec., p. 303).

Thus the American Woolen Company in fact has profited to the amount of at least $12,500 by its arrangement with Horowitz. It got back all the goods and all the money it ever risked in the enterprise, and also got back $12,500 on the mortgage which was given to secure the "consignment" contract.

The Bill.

The plaintiff's bill (Rec., p. 2–21), as Judge HOUGH says,

> "correctly alleges the main features of the plan above set forth" (Rec., p. 212).

The learned Judge also pertinently observes (Rec., p. 211) that the key of the bill of complaint is in the allegation that by reason of these facts

> "the said stock of goods delivered by said American Woolen Company and maintained at the said place of business of the bankrupts, became and remained the property of the latter in so far as the rights of all the latter's subsequent creditors, among whom were those whose claims have been duly proven and allowed herein, were or are affected or in any way concerned" (Rec., p. 9).

In an earlier passage the bill alleges that the plan was in fraud, not only of these subsequent creditors, but also of those whose claims existed at the time the scheme was launched, but, as it happened, all the creditors represented by the plaintiff were in the former

class (Rec., p. 4). Thus the bill amounts, as Judge HOUGH says, to

> "an assertion that the removed goods belonged, in the eyes of the law, to the bankrupts, and therefore belong to their trustee, and that this case is brought to remove from said goods or their value the incumbrance created by the creation of the Niagara Company and the apparatus of contract above recited" (Rec., p. 211).

The only facts alleged in the bill which the Judge thinks were not established in evidence, were that Horowitz & Son rendered bills for Niagara goods in their own name and placed the proceeds of sales in their own bank account (Rec., pp. 210–211). The evidence shows that the Horowitzes rendered bills in the name of the Niagara, and placed the proceeds of collection in the Niagara bank account. This however, makes no difference in view of the facts that, however, bills were made in the Niagara name, yet, as the Judge finds,

> "in selling goods Horowitz and his clerks made no discrimination between Woolen Company goods and other goods; all were offered alike and all customers were solicited through Horowitz" (Rec., p. 209).

and that, however moneys received for Niagara goods were paid into the Niagara account, yet these moneys were not turned over to the American as received, but only in round amounts and as "much money as the account would stand without undue depletion" (Rec., p. 209).

The Decision of the District Court.

Judge Hough considers that the arrangement while valid *inter partes* (Rec., p. 211) was, by reason of its provisions, as appearing both on the face of the agreements and under their interpretation, or gathered from the mutual conduct of the parties, and tested legally at the instance of the bankrupt's creditors, in effect a sale by the American Company to the Horowitzes; so the position the Horowitzes occupied to the American Company, in so far as the rights of the former's creditors are concerned, was that of vendees having title to the goods; consequently the American Company acted wrongfully in re-taking the goods after the failure of the Horowitz firm.

The learned judge construed the so-called "consignment" agreement as being really one of sale. He says:

> "It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same '*under the provisions of Clause 4*,' but Clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Woolen Company the sale price thereof, less the difference between such price and the invoice value. It follows that if the Niagara Company could not account to the Woolen Company for money by selling the goods it was nevertheless bound to pay the invoice price, and (continues the written agreement) 'thereupon title to said merchandise * * * so paid for shall pass to' the Woolen Company" (Rec., p. 206).

And again:

> "Merchandise once delivered on consignment to

the Niagara Company could be sold by the latter, and any advance over the invoice price or value retained, and it is evidently by such sales at advanced prices only that the Niagara Company could make any earnings whatever. If the goods were not sold, or were sold at a loss or to persons who did not pay, it was nevertheless plainly incumbent upon the Niagara to pay to the Woolen Company the invoice price" (Rec., pp. 207–208).

The interposition of the corporate entity of the Niagara Company makes no difference. It was not an independent concern actually making contracts in its own behalf and maintaining a real existence separate and apart from the Woolen Company and from Horowitz.

> "* * * There was no real person for the Woolen Company to contract with except the bankrupts, and the whole and avowed meaning and intent of the arrangement was not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them" (Rec., p. 214).

The Judge therefore directed an accounting for the value of the woolens (Rec., p. 215). It being called to his attention that the defendants had admitted this value (Rec., p. 42), the decree dispensed with the accounting and gave judgment for this amount (Rec., p. 32).

The defendants' counsel argued in the District Court that the transaction was a consignment alone, and that to the Niagara Company; so that in any case the bankrupts were strangers to the goods, and hence even if the Court should consider the arrangement as consti-

tuting a sale, it would not help the Horowitzes' creditors, because it would be a sale to the Niagara Company and not the Horowitzes. Judge HOUGH thus outlines their position of that time :

> "They urge that the transaction was (1) A consignment and nothing else; and (2) The bankrupts were not the consignees, but were at all times strangers to the goods, whence it follows that the Woolen Company owned the goods taken; but if not, then whoever owned them, Horowitz & Son certainly did not" (Rec., p. 212).

In other words, the defense leaned heavily, at least in the court of first instance, upon the barrier created by the fictitious personality of the Niagara Company.

The learned Judge then took up each branch of this argument. He held "that in legal effect the delivery of the goods in question to the Niagara Company constituted a sale to that company," it then "remaining to consider whether this finding can benefit the creditors of Horowitz" (Rec., p. 213). And then he concluded that the Niagara Company was a plain fiction.

> "The legal effect of this arrangement was exactly the same as that even more plainly expressed in the consignment agreement between the Woolen Company and Horowitz of 1901, with this difference only —that so far as the paper writings are concerned, Horowitz could return in 1901 goods he did not want, whereas when in 1902 the transparent window of the Niagara Company was erected between himself and the Woolen Company, he was forbidden that privilege" (Rec., p. 214).

The majority decision of the Circuit Court of Appeals.

The majority of the Circuit Court of Appeals (WARD and COXE, J. J.) voted to reverse Judge HOUGH on the ground that the written agreements constituted either a conditional sale or "a consignment or factorage agreement," Horowitz being the consignee. "The transaction regarded either as a consignment or as a conditional sale to Horowitz & Company was entirely legal as against their creditors" (Rec., p. 227). The Niagara Company played no part in this decision as an independent entity. Its purpose was entirely subordinate to the principal agreement between the American Company and Horowitz, viz: it was meant only to "be a sort of cash box for the Woolen Company and check on the transactions of Horowitz & Company" (Rec., p. 227).

The majority opinion differs with Judge HOUGH on the meaning of the written agreements. According to this view, Horowitz & Son were not bound to pay the Woolen Company for goods not re-sold by them. "Merchandise on hand would be accounted for by the fact that it was on hand" (Rec., p. 227). The opinion does not discuss any of the conduct of the parties preceding the agreement, or during its continuance.

Judge LACOMBE, who dissented, unqualifiedly endorses Judge HOUGH's opinion (Rec., p. 228).

The result of the opinions to the present date.

All of the four Judges who have sat in this case concur in considering the Horowitzes as the actual parties

to whom the American Woolen Company delivered the goods, and with whom it had always dealt. The Niagara Company has been by common consent eliminated as an actual party. At most, in the opinion of WARD and COXE, JJ., it was "a sort of cash box for the Woolen Company." In the opinion of HOUGH, J., with whom Judge LACOMBE concurs, it served not even that minor purpose.

It is only as to the nature of the agreement between the American Woolen Company and Horowitz, under which the woolens were delivered, that the Judges differ.

Summary of Points and Assignments of Error.

Goods claimed by the Woolen Company having been found in the possession of the bankrupts, such possession must have resulted from either (1) a sale absolute or conditional; or (2) a bailment in the nature of a consignment for the purpose of sale.

This point deals in part with the assignments of error dealt with in the Second and Fourth Points.

II.

The Circuit Court of Appeals erred in holding that the transaction constituted a consignment. The arrangement under which the parties acted did not constitute the relation of principal and factor; in other words, it was not a consignment contract. On the contrary, it has every element of a contract of sale.

This deals with the fourth, fifth, seventh, eighth, ninth and twelfth assignments of error.

III.

Properly construed, the agreement, as to the bankrupts' creditors, effected a sale of the goods by the American Company to the bankrupts. The Circuit Court of Appeals erred in its construction of the written agreements taken literally, and also erred in not construing the agreements in the light of the surrounding circumstances and the acts and declarations of the parties thereunder.

This deals with the first, fourth, fifth, seventh, eighth, ninth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth and twentieth assignments of error.

IV.

The Circuit Court of Appeals erred in holding the agreement to be valid as a conditional sale. Assuming the arrangement to be a conditional sale, yet it cannot be upheld because it allowed the vendee to deal with the goods in a manner inconsistent with the conditional ownership of the vendor.

This deals with the fourth, ninth, tenth, twelfth and thirteenth assignment of error.

V.

The corporate entity of the Niagara Woolen Company cannot operate to defeat the claims of the creditors of Horowitz, as above discussed.

This deals with the sixth and twentieth assignments of error.

POINT I.

Goods claimed by the Woolen Company having been found in the possession of the bankrupts, such possession must have resulted from either (1) a sale, absolute or conditional, or (2) a bailment, in the nature of a consignment for the purpose of sale.

The status of the parties must either have been that of vendor and vendee under an absolute sale, conditional vendor and vendee under a conditional sale, bailor and bailee under a bailment (or one of the relations that arise out of the existence of the several forms of bailment), or, finally, mortgagor and mortgagee. No other relations known to the law could possibly have existed between the parties. Under the proofs it is unnecessary for us to discuss whether or not their relation was that of bailor and bailee under a depositum or pledge or any of the varied forms of bailment, except, possibly that of principal and factor. Nor is it necessary for us to discuss whether or not the relation of the parties was that of mortgagor and mortgagee for such claim, if made, would have been unavailing, because no mortgage appears of record in the State of New York affecting the property in suit, and under New York Law an unrecorded chattel mortgage is *ipso facto* void as against the creditors of the mortgagor in possestion.

N. Y. Lien Law § 230.

Skilton vs. *Codington* (185 N. Y., 80).

In re Gerstman (157 Fed., 549).

POINT II.

The Circuit Court of Appeals erred in holding that the transaction constituted a consignment. The arrangement under which the parties acted did not create the relation of principal and factor. In other words, it was not a consignment contract. On the contrary, it has every element of a sale.

Judge WARD, speaking for himself and Judge COXE, constituting a majority of the Circuit Court of Appeals, says:

> "Though there are some inconsistencies in the language of the agreement and in the correspondence between the parties, we are clearly of the opinion that it was their purpose honestly to make a consignment or factorage agreement" (Rec., p. 227).

Of course if such purpose appeared in the case, and was fulfilled, the creditors represented by the present complainant would have no grievance.

The validity of an honest factorage arrangement has never been doubted since the days of Lord MANSFIELD, and the decision in *Mace* vs. *Cadell* (1 Cowp., 232). To-day it is just as clear as it then was, that a *real* factorage arrangement is valid as against the creditors of the factor.

A factor or commission merchant is nothing but a bailee, into whose hands his principal has placed goods in order that the factor may sell them for his principal's benefit. If the factor is at a distance from his principal,

or his principal is not acquainted with the particular circumstances of the locality where the factor does business, it very often happens that the latter guarantees to his principal the accounts of the persons to whom he in turn shall sell the goods. This is called a *del credere* arrangement.

In the present case every fact is present which would prevent this transaction from being one of factorage, and none of the essential elements of a factor's obligations appear. And *per contra*, every element of a sale appears.

1. *In a consignment arrangement the principal selects the goods which he desires to be sold. Here the so-called factor selected the goods, bargaining about the price.*

The consignment agreement provides that the Woolen Company "shall deliver from time to time such goods, wares and merchandise as it, in its judgment, sees fit" (fols. 64-5).

The course of dealing between the parties, however, was exactly the opposite. The Woolen Company delivered only such goods as the Horowitzes ordered. Joseph Horowitz testifies that before the formation of the Niagara whenever the Horowitzes wanted goods "we went up to the department and ordered goods there on order for the fall and spring and received them in due time * * the price was agreed upon * * * that we was to pay" (fol. 305). After the formation of the Niagara the procedure was exactly the same. Horowitz testifies: "I went up to the department and placed my order and agreed to certain prices to be paid for the

goods" (fol. 308). "We selected the goods right there from the sample. * * * We agreed to the price. I asked the price, what price these goods were, and he said the price was 1.47 1/2 or 1.65, and we then agreed to the price and I placed my order and got a copy of the order" (fols. 309-10). They "bargained about the price" (fol. 311).

2. *The so-called factor could not return any goods which had once been ordered. This is incompatible with the idea of a consignment, and renders the transaction one of sale.*

Helby vs. *Mathews* (1895 App. Cases, 471), and cases there discussed.

In the invoice which was delivered with each lot of goods (Plaintiff's Exhibits 7 and 8, Rec., pp. 146, 147) is this provision: "No goods to be returned or allowance made for any cause after goods are sponged or cut. All terms of sale and delivery are set forth in this copy of order" (Rec., p. 146). This was no mere form, because in addition we have a letter which was written by the American Woolen Company to Joseph Horowitz as president of the Niagara Woolen Company (Rec., p. 73), which states as follows: "*We cannot at this late day consent to have thrown back into our stock fall goods which were made expressly for you and delivered in accordance with the terms of the agreement*" (Plaintiff's Exhibit 17, Rec., p. 150).

The letter of the Woolen Company is very flat. It expresses nothing but the idea of the Woolen Company that it did not have to agree to take back the stock,

that it would not take back the stock, and that it would require a new agreement to make it take back the stock. This is utterly inconsistent with the idea of a factorage agreement.

Finally an agreement was made which is Plaintiff's Exhibit 12, Rec., p. 148. In that agreement Horowitz & Son "agreed to hold the American Company of N. Y. harmless from any loss they may sustain by being obliged for any reason whatsoever to take back for re-sale any goods consigned or delivered to us at off prices" (Rec., p. 148). This is absolutely inconsistent with the idea of a consignment arrangement, which essentially contemplates that the goods at all times are the property of the consignor, and therefore, of course, he has the right to re-take them at any time from the factor. If the agreement is such that the factor cannot return the goods for any length of time, then, under all the decisions, the transaction is not a consignment arrangement.

Nor is there anything in the original agreement between the parties which would permit the factor to return the goods. Judge WARD, who spoke for the majority of the Circuit Court of Appeals, maintained that Horowitz was not bound to pay for unsold goods. He could account for goods by turning over their proceeds when sold, or by showing that the goods were still on hand, according to this majority opinion (Rec., p. 227). But that opinion does not assert, nor could it argue, with the contract plainly before it, that the Horowitzes ever had the right to return goods. No such right is given by that agreement, and all the other agreements

and transactions above discussed show the plain intention to the contrary.

A common test in determining whether a contract is one of consignment or sale is whether the party delivering the goods stipulates for the return of any that may remain unsold. As is said in a recent case, "this is a quite universal provision in contracts held to be good as consignment contracts."

Re Zephyr Co. (203 Fed., 576, 579).

But here the "consignor" not only did not so stipulate in advance, but positively refused to retake the goods, claiming the Horowitzes had no right to return them.

In this connection we distinguish the case of *John Deere Plow Co.* vs. *McDavid* (137 Fed., 802) which the appellees cited below. There the agreement expressly entitled the consignor to exact the return of the goods (see first head note of report). And so with *In re Galt* (120 Fed., 64) also cited. Here not only is the contract decidedly the other way, *but, as we have seen, the Woolen Company flatly refused to take back goods.*

3. *It is inconsistent with the idea of a consignment agreement that one becomes a factor before the goods are delivered to him.*

The essence of a consignment agreement is a bailment, and there is no bailment until the delivery of possession.

12 Am. and Eng. Enc. of Law (2d edition), 631.

Wright vs. *Campbell* (4 Burr., 2046).

Ommen vs. *Talcott* (188 Fed., 401).

Even after goods have been shipped by the principal to the factor the factorage agreement does not begin to operate until the factor has received them from the carrier; and until that time, he not being in possession of the goods, the right of stoppage in transit exists, irrespective of any factor's lien.

Ryberg vs. *Snell* (2 Wash., C. C., 294, 403; Fed. Cases, Nos. 12189, 12190).

In this case it has been proven that the American Woolen Company charged goods to the account of the Niagara before they had ever been delivered, or any kind of possession had been given (Rec., pp. 136-138).

This contradicts any idea of a consignment arrangement. Goods are not consigned until they are delivered. The factor cannot be charged for them until his responsibility arises, and that does not occur until he receives them.

4. *The factor's duty to keep the principal's goods separate from his own was not performed or required.*

That this duty exists in the case of every factor cannot be disputed. To use the language of Lord LANGDALE, M. R.:

> "Among the most important duties of a factor are those which require him to give to his principal the free and unbiased use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons."

Clark vs. *Tipping* (9 Beav., 284, 292).
1 Am. & Eng. Enc. Law (2 Ed.), 1089.

In this case the evidence is clear that the goods of the American were in no way kept separate from the goods of Horowitz & Son (Rec., pp. 60-61, 91, 112, 113). The American was aware of this situation, because its representatives, Dawber and Hartough, were there every day, yet no protest was ever made. The only excuse the appellees make for this is that such confusion of goods is inevitable in the business of every factor. While this might be allowed in the case of a grain elevator, we know of no case which sanctions such a usage in the case of goods separable by nature.

5. *The factor's duty to turn over the moneys to his principal as received was not required.*

Even though he has a *del credere* commission and guarantees the accounts, yet the moneys which a factor receives are trust moneys, and are to be turned over with no deduction or diminution, excepting only for his proportions, which amounts to his compensation.

Wallace vs. *Castle* (14 Hun, 106).
Bills vs. *Schliep* (127 Fed., 103).

Thus in *In re Galt* (120 Fed., 64), where a consignment arrangement was upheld, the Court, in holding that it was legitimate, said :

> "The proceeds, whether in cash or in the notes of the purchaser, were to be immediately turned over to the Company."

In re Galt (120 Fed., 64).

That is not the fact here will appear by our discussion under another Point (*infra*, pp. 70-8).

There is also a difference between the contract of November, 1901, and the contract of November, 1902. In the contract of November, 1901, all bills for goods of the American were to be rendered payable to the American direct (Rec., p. 141). In the agreement of November, 1902, on the contrary, there is no such provision, and the only provision is that if the Niagara does not "account" for the sale of goods it shall be under agreement to pay to the American the price of these goods, whereupon title to the goods shall pass direct to the Niagara (Rec., p. 13). But as we have already shown the Niagara could not return goods on hand, and so it could "account" for them only by paying the invoice price, whether it had succeeded in reselling the goods or not. Not only that, but inducements are given the Niagara to pay these invoice prices in advance by the discount arrangements which will hereinafter be mentioned.

There never was such a consignment agreement as that. The essence of a consignment is that the goods are the principal's. When these goods are sold the proceeds are the principal's, and at any time he is entitled to have back his goods, or, if they are sold, to have his money. It is the duty of the factor to account for these goods and money; to keep the goods separate from his own and to turn over the money to his principal as and when received.

None of these things were done in this case; all the parties concurred in doing exactly the opposite. The conduct of the parties throughout this matter has clearly been based upon the idea that there was no consignment account of any nature or description except for use in purposes of dire emergency.

6. The other business methods of the parties are inconsistent with a consignment, and show a sale.

The testimony is undisputed that for some time before any so-called consignment agreement was made Horowitz & Son had been buying merchandise outright from the American Woolen Company (Rec., pp. 58, 64, 65). This is a significant fact in the consideration of whether the later agreement was not really to the same effect, as the case of *In re Wells* (140 Fed., 752) shows. The appellees endeavored to distinguish that case on this ground, forgetting that the same facts exist here as in that case.

The American Woolen Company, however, desired a nominal consignment arrangement, and so the agreement of November, 1901, was drawn up by its attorneys (Rec., p. 59). Under this agreement business continued up to the time of the formation of the Niagara. But when the matter of incorporating the Niagara and a new consignment agreement was mentioned by Mr. Murphy, the latter said that it would make no difference in the way business was to be done. "It was to be done in the same way" (Rec., p. 63).

The business methods continued exactly the same. There was no difference in the selling of the merchandise (Rec., p. 64). There was no difference in the way the goods were shipped (Rec., p. 64). There was no difference in the way the goods were kept in the store; they were still mingled with the goods of the Horowitzes (Rec., p. 64). Not only that, but a dispute arose between the Horowitzes and the Woolen Company

about the terms of discount which should be allowed. Finally, however, is the memorandum of Mr. Murphy in settlement of this matter (Plaintiff's Exhibit 16, Rec., pp. 71, 150), which is as follows: "*Sales to be made on terms of 8/60 days; we accept payment on account of sales on average due date, interest to be charged. * * * Credit Phillip Horowitz & Son with 2% on net amount of sales*" (Rec., p. 71).

Also should be noted the language of the delivery manifests (Plaintiff's Exhibit 7, Rec., p. 146). There the American "reserves the right to manufacture these goods in any mill of its organization" (Rec., p. 146). Such a reservation was unnecessary as against a factor.

In each of these manifests the name of the American's salesman is inserted, e. g., "*Salesman, Muldoon*" (Rec., p. 146). If the manifest represented the delivery of goods on consignment, how could a *salesman* of the consignor, whose business was organized into many departments, figure in the transaction? This language is utterly inconsistent with the idea of a factorage agreement. It is of more value than all the language of the agreements which the lawyers prepared. It shows that Murphy regarded the Horowitzes, not as his company's factors, but as vendees.

7. *It is inconsistent with a consignment agreement that the factor can sell when he desires and for what price he desires, but must pay his principal for them at a fixed price whether he sells or not. This constitutes a sale.*

Judge HOUGH thus construes the agreements in evidence:

"If the Niagara Company could not account to the

Woolen Company for money by selling the goods, it was nevertheless bound to pay the invoice price, and (continues the written agreement) thereupon title to said merchandise so paid for shall pass to the Woolen Company" (Rec., p. 206). "If the goods were not sold or were sold at a loss or to persons who did not pay, it was nevertheless plainly incumbent upon the Niagara to pay to the Woolen Company the invoice price" (Rec., p. 207). "The American Woolen Company was from the moment of delivering goods contractually entitled to recover from Horowitz the sale price of those goods, and could not be compelled to resume possession of any of them" (Rec., p. 212).

If this is true, there was no consignment arrangement. To use the words of MELLISH, L. J.: "Whatever the parties may think, their relation is not that of principal and agent."

Ex parte White (L. R., 6 Ch. App., 397; aff'd *sub nom. Towle* vs. *White*, 29 L. T. N. S., 78).

Upon this point the majority of the Circuit Court of Appeals differ with Judge HOUGH, and this is discussed in a subsequent point of this argument. If Judge HOUGH is right, as we submit he is, little more need be said.

The case last cited is exactly in point.

The question was whether the bankrupts were the factors of Towle & Company so that the latter could claim as trust funds money received by the bankrupts from sales of goods delivered to them by Towle & Company. The firm of Towle & Company had the

custom of sending cotton yarn to the bankrupts upon the terms that the latter could make it up into goods and sell it to whatever customers and on whatever credit might be chosen. A list of prices was sent with the goods and at the end of each month the bankrupts rendered an account of the yarn sold and the following month would pay Towle & Company for the quantity sold according to the price-list. The Court held that the bankrupts were not the factors of Towle & Company. The reasoning of the Court of Appeals is thus expressed by MELLISH, L. J.:

> "If the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent."
>
> *Ex parte White* (6 Ch. App., 397, 403).

In the House of Lords, Lord SELBORNE, L. C., approved the language of MELLISH, L. J. He put the test whether Towle & Company could have sued as undisclosed principal for the purchase price of any of the goods which the bankrupts had sold.

> "If this were so," he said, "it follows that if there were anything in the article delivered upon which an action against the vendor could be founded by the purchaser, then every one of these customers could recover against Towle & Company. What could be conceived more contrary to the spirit of the contract between these parties? What would have more astonished Mr. Towle if the bleacher and the

dyer of the goods had sued him for the cost of bleaching and dyeing?"

Towle vs. *White* (29 L. T. N. S., 78, 80).

The rule of *Ex parte White* has been universally followed by American courts. It is the law in New York.

Stoneman vs. *Van Vechten* (46 App. Div., 370; aff'd 165 N. Y., 666), and cases there cited.

It has also been followed by the Federal courts.

Thus in *In re Wells* (140 Fed., 752) this test is thus stated by ARCHIBALD, J.:

"Were the goods put in the hands of the one party by the other to be sold for him and on his account, creating a relation of principal and factor, or were they turned over to such purchaser to be treated and disposed of as his own, being responsible to the other for the price?"

In re Wells (140 Fed., 752).

Banker Bros. Co. vs. *Pennsylvania* (32 Sup. Ct. Rep., 38).

The same question is discussed in a very learned way by Referee DEXTER, *In re Penney and Anderson* (176 Fed., 141).

7. *Even if the majority of the Circuit Court of Appeals be right in their construction of the agreements, and Horowitz was not bound to pay for the goods at any fixed time or so long as they remained unsold, still as Horowitz had the absolute right to pay for the goods at invoice prices, no consignment relation arose.*

The construction claimed by Judge WARD is this :

The Niagara can account for the merchandise by either (1) showing that the merchandises was on hand and unsold or (2) paying the invoice price. If it pays the invoice price it gets title to the goods, or to their proceeds, if they have already been sold. (Rec., p. 227).

Judge WARD, however, does not deny that Horowitz had the right to acquire title to any goods, sold or unsold, by paying for them at the invoice prices. If Judge WARD is right, and the agreement permitted Horowitz to buy unsold goods, and required him to pay for goods at invoice prices only when they were sold, with discount arrangements to promote celerity in selling, the transaction does not create the relation of principal and factor.

Ex parte White (L. R. 6, Ch. App. 397 ; aff'd *sub. nom. Tiaale* vs. *White*, 29 L. T. N. S., 78).

Stoneman vs. *Van Vechten* (46 App. Div., 370 ; aff'd 165 N. Y., 666).

This is precisely held in the New York case cited :

> "This is simply a case of merchandise received by defendants on sale or return. If disposed of, then to be paid for at prices fixed in advance. If not disposed of, then to be returned. Beyond question the defendants had the right to appropriate the specific proceeds of such sales to their own use, and this right is wholly inconsistent with plaintiff's contention that defendant can be held on a charge of wrongful conversion of the proceeds of such sales."

Stoneman vs. *Van Vechten* (46 App. Div., 370 ; 165 N. Y., 666).

So in *Ex parte White*, the arrangement, as stated by JAMES, L. J., was that the bankrupt

> "was not to pay for them unless he disposed of them, and he was to return, at the end of every month, an account of sales that he had actually made" (6 Ch. App., pp. 399–400).

Such facts could not take the case out from the reasoning of MELLISH, L. J.:

> "The contract of sale which the alleged agent makes with his purchasers is not a contract made on behalf of his principal, for he is to pay a price which may be different, and at a time which may be different, from those fixed by the contract."
>
> *Ex parte White* (6 Ch. App., 397, 403).

Referee DEXTER expresses the same idea when of a similar case, he says:

> "The transaction did not create the relation of principal and factor, for a factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services."
>
> *In re Penney and Anderson* (176 Fed., 141, 144).

Pursuing his analysis still further, MELLISH, L. J., says:

> "He is not guaranteeing the performance, by the persons to whom he sells, of their contract with him, which is the proper business of a *del credere* agent; but he is to undertake to pay a certain fixed price for those goods, at a certain fixed time, to his principal, wholly independent of what the contract may be with the persons to whom he sells; and my opinion is that, in point of law, the

alleged agent in such a case is making, on his own account, a contract of purchase with his alleged principal, and is again re-selling. * * * I do not say that it is not possible for parties to make a bargain under which the consignee may receive in his remuneration whatever the goods fetch above a certain price, and yet sell them as agent; but the question is whether such a bargain is to be inferred in the present case. If A hands over his goods to B, and B is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B then sells to C, the natural inference from those facts is, beyond all doubt, that there is a sale made to B, and another sale from B to C, and all the circumstances confirm the view that such was the nature of the dealing here."

Ex parte White (6 Ch. App., 397, 403-404, 405).

The essential idea of agency is representation. A middleman is not an agent and never was, and no verbiage can make him such.

The Woolen Company did not, of course, try to sustain its right to the goods on the theory that they were merely pledged with the bankrupt, or deposited as in a warehouse, nor that it was a case of sale or return. It is therefore apparent that the relation of the parties could not have been that of principal and factor, nor that of bailor and bailee under any of the many variants of the forms of bailment. It was a clear case of sale. It could be nothing else as against the creditors of the vendee, however, theoretically, it may have been otherwise *interpartes*.

POINT III.

The Circuit Court of Appeals erred in its construction of the written agreement, taken literally, and also erred in not construing the agreement in the light of the surrounding circumstances and the acts and declarations of the parties thereunder. Properly construed, the agreement, as to the bankrupts' creditors, effected a sale of the goods by the American Company to the bankrupts.

By the agreement of November 25, 1902, made between the American Woolen Company of the first part and the fictitious Niagara Woolen Company of the second part, it was provided that the American Company should, from time to time, deliver such goods, wares and merchandise as it in its judgment saw fit to the Niagara Company, and the latter agreed to accept possession of and hold and care for the same as the property of the American Company; it being expressed in the agreement that title to the merchandise or its proceeds would always be vested in the American Company, and the merchandise should at all times be subject to and under the direction and control of the American Company, title to pass directly from it to such person or persons as the Niagara Company might sell to.

The Niagara Company agreed to keep the merchandise fully insured for the benefit of and in the name of the American Company in solvent fire insurance companies.

Paragraphs IV and V of the agreement are as follows:

> "IV. Said party of the second part [Niagara] agrees to sell such merchandise to such persons as they shall judge to be of good credit and business standing, and to collect for and in behalf of the party of the first part [American], all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid immediatelyupon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part, and the price at which said merchandise has been sold as aforesaid by the parts of the second part.
>
> V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise possession of which is delivered to it under this agreement, and it hereby agrees in case any merchandise delivered under this agreement by the party of the first part to the party of the second part is not accounted for to the party of the first part under the provistons of Clause IV, of this agreement to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof so paid for shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement."

In construing this agreement Judge HOUGH stated as follows:

> "It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for same under the provisions of Clause 4, but Clause 4 contains as above set forth a specific agreement on the part of the Niagara Company to sell the mer-

> chandise and pay over to the Woolen Company the sale price thereof less the difference between such price and the invoice value. It follows that if the Niagara Company could not account to the Woolen Company for money by selling the goods it was nevertheless bound to pay the invoice price and (continues the written agreement) thereupon title to said merchandise so paid for shall pass to the Niagara Company. It was further provided (6) that the invoices given by the Woolen Company to Niagara Company 'are to be subject to the usual trade discounts' of the Woolen Company" (Rec., p. 206).

The learned Judge held that the legal effect of the delivery of the goods in question to the Niagara Company under the above agreement constituted a sale to that company. Then, as the Niagara Company had no real separate existence, the sale, to all intents and purposes, was really made by the American Company to the bankrupts and they were the vendees of such goods as were delivered under the agreement, having title thereto and right of possession as against the American Company, but being, from the time of the receipt of the goods, contractually obligated to remit to the American Company the invoice value thereof.

It is difficult to improve upon the reasoning of the trial Judge, which reasoning was concurred in by the presiding Judge in the Circuit Court of Appeals (Rec., p. 228). The majority of the Circuit Court of Appeals, while agreeing in the elimination of the Niagara as a party to the transaction, held that Clause IV merely referred to accounting for goods sold by the Niagara Company [or Horowitz], that goods not accounted for to the American Company under the provisions

of Clause IV meant merchandise sold, and that merchandise on hand would be accounted for by the fact that it was on hand (Rec., p. 227). Let us see where this carries us.

Clause IV contains a specific agreement on the part of the Niagara Company to sell "such merchandise," but in order to determine what is meant by the use of the words "such merchandise" we must go back to preceding clauses of the agreement, for, obviously, the words refer back to merchandise more particularly described. We find that the only merchandise referred to in the agreement, and to which these words must, of necessity, apply, is merchandise delivered by the American Company to the Niagara Company under the agreement of November 25th. Therefore, under the provisions of Clause IV the Niagara Company obligated itself to sell such person or persons as it might deem proper all merchandise delivered to it by the American Company, and to remit to the American Company all amounts collected by it upon the sale thereof. Under Clause V the Niagara Company obligates itself to pay at the invoice value for all goods not accounted for to the American Company under the provisions of Clause IV.

Under Clause V the Niagara guarantees the payment of all bills of accounts for merchandise delivered under the agreement. It also agrees, in case any merchandise delivered to it is not accounted for under the provisions of Clause IV, to pay to the American the invoice price of the merchandise. Under this clause, therefore, the Niagara agrees to do two things—(1) to

pay for all merchandise which it has sold to others, and (2) to pay for all merchandise which is not accounted for under Clause IV.

The next question is, what kind of an accounting does Clause IV provide for? This clause provides that the Niagara shall sell the merchandise to such persons as it shall judge of good credit, collect the amounts due on such sales, and pay them over to the American, minus the difference between the price at which the merchandise was invoiced to the Niagara and the price at which it has been sold. The only accounting which Clause IV thus provides is based upon the agreement of the Niagara to sell the goods and pay over the invoice price.

Judge WARD, however, considers that Clauses IV and V do not take into account merchandise on hand. He says that "merchandise on hand would be accounted for by the fact that it was on hand." There is nothing in the agreement to authorize this conclusion. If the merchandise is on hand, then it is not accounted for under Clause IV, which provides only for the merchandise which has been sold. Clause V specifically covers the case of merchandise *not accounted for under Clause IV*. Therefore, Clause V must mean merchandise on hand. Clause V prohibits Judge WARD's idea that merchandise on hand would be accounted for by the fact that it was on hand, because Clause IV provides that in just such a case the Niagara shall pay to the American the invoice price of such merchandise.

Judge WARD seems to derive help from Clause VIII. But that clause provides for merchandise on hand *only*

in the event of the termination of the agreement for any reason. It does not allow an accounting for merchandise on hand at any time during the continuance of the agreement; that is precisely the point. So long as the agreement continued the Niagara could not return merchandise. If the agreement terminated, then the American could retake the merchandise. That is precisely what Judge HOUGH means when he says that the purpose of the agreement was to allow Horowitz to sell the goods at his own price without owning them, and allow the American to retake the goods in the event of anything happening where it could not get payment of the invoice price from Horowitz.

The majority of the Appellate Court say that "the goods were to be sold by Horowitz & Company at not less than the invoice price." We submit that this statement is erroneous. Clauses IV and V of course contemplate that Horowitz & Co. can sell, if they please, at or above the invoice price. That is provided for by Clause IV. But the agreement also contemplates their selling below the invoice price. In such a case, while there can be no accounting as provided for by Clause IV, still the case is covered by Clause V, where it is provided that Horowitz, in the case of any merchandise not accounted for under Clause IV must pay to the American the invoice price. That gives Horowitz freedom to sell for whatever price he pleases but leaves him bound anyhow to pay the American the fixed invoice price. That this is so is especially borne out by the ensuing language that when Horowitz thus pays the invoice price, "thereupon title to such merchandise, *or*

the proceeds thereof, so paid for, shall pass" to Horowitz. This contemplates a case therefore where Horowitz has already sold the goods and has the proceeds of the sale. He cannot account for these proceeds under Clause IV because he cannot pay over the full amount collected, since that amount is less than the invoice price. But he can pay the invoice price and thus release the proceeds of the sale to himself.

It seems impossible to put any reasonable construction upon the language of these two clauses read together other than that placed upon them by the trial judge. He held that if the Niagara Company could not account to the American Company for money by selling the goods it was, nevertheless, bound to pay the invoice price, and thereupon title to the merchandise so paid for should pass to the Niagara Company. This is the clear and obvious meaning of the agreement. It was evidently the intent of the American Company, and they effectually expressed that intent, that at all times after the goods were delivered by it to the Niagara Company they were entitled to receive the full invoice value, the price at which they had agreed to part with their title. If the Niagara Company sold a portion or all of the goods and remitted to them the invoice value out of the proceeds of its sales, well and good, but if the Niagara Company was unsuccessful in disposing of all of the goods delivered, it nevertheless was bound to pay for the entire lot at the price at which the American Company had invoiced them. There never was a moment of time after the goods came into the possession of the Niagara Company that they were not, in the language of the trial

judge, "contractually obligated to pay the invoice value therefor." There is nothing giving the Niagara Company the right, under any circumstances, to return goods.

It is elemental that where the manufacturer of goods delivers the same to another person and from the moment of delivery the person who receives the same is obligated to pay therefor, and has no right to return them under any conditions, the title passes from the manufacturer to the person who receives the goods and the manufacturer has his cause of action against such person for the agreed value. This constitutes a sale if ever a sale was constituted, and it would seem idle to cite authorities on the question of what is and what is not a sale in support of this point. As Judge HOUGH says, "it has never been held that one to whom goods were delivered, which he not only might sell, but must pay for whether he sells them or not, and who also cannot return any of the merchandise, is a bailee" (Rec., p. 213).

A grievous error of the Circuit Court of Appeals in construing this agreement, also, was their failure to look at the agreement in the light of the attending circumstances and the acts and conduct of the American Company and the bankrupts thereunder. So viewed, it is undoubted that the agreement constituted a sale of the goods from the American Company to the bankrupts, and that the latter at the time of their failure were vested with title to the goods thereafter removed by the American Company. When the language of a contract is ambiguous, it is elemental that

the contract should be construed in the light of the attending circumstances.

We submit that the language of the agreement is clear and that in reading Clauses IV and V together it was plainly the intent of the American Company to divest itself of title upon delivery of the goods to the Niagara Company thereafter looking to the Niagara Company to reimburse it for the invoice value thereof.

But if the face of the contract is not as we contend, at least it cannot be safely treated as clearly the other way. The majority of the Circuit Court of Appeals argue, by inference, that merchandise on hand would be accounted for by that fact alone. But they do not say that Horowitz had the right, under the agreement, to return merchandise. If they meant to say that, that then is another inference drawn from the fact that merchandise is accounted for by simply being on hand, and so they must draw inference from inference.

If the intent of the parties cannot be gathered from a mere perusal of the language of the contract itself, then the contract is ambiguous, and assuming this to be the case, it follows that the Court in construing it should have had the benefit of a knowledge of the circumstances attending its execution and the way the parties themselves acted under it. All of these facts we have discussed under the preceeding Point (supra, pp. 36–44).

In many cases it would be idle for creditors to ask the courts to legally test an arrangement such as is under review if the courts simply tested the written agreements literally. Parties desiring to perpetrate a fraud upon creditors are generally most careful in choosing

the language of their written agreements. Taken at their face value, they are full protection to the parties as between themselves and against all the world; taken, however, in the light of the conduct of the parties, their true intent and purpose is easily spelled out and the courts in innumerable instances very properly go behind all the language employed and determine what the contracts mean by what the parties by their acts and conduct have declared them to mean, or, to put this in the language of Lord Chancellor SUGDEN, in *Attorney General* vs. *Drummond* (1 Dru. & War., 353-366; aff. 2 H. L. Cas., 837). "Tell me what you have done under a deed and I will tell you what that deed means." Unless the language of an agreement is so clear as to admit of no reasonable controversy as to its meaning, the court is not likely to go astray if it enforces that construction which the parties without coercion have themselves acted upon.

District of Columbia vs. *Gallaher* (124 U. S., 505).

Lowrey vs. *Hawaii* (206 U. S., 206; 27 Sup. Ct. Rep., 622).

Both parties to the agreement under review, prior to any controversy having arisen in regard thereto, acted on a practical construction, and that construction was that from the moment of delivery the bankrupts were free to deal with the goods as their own, being obligated only to pay to the American Company the invoice value. They could sell at any price they chose, could give the goods away if they cared to, burn them up or in any other way destroy them, so long as they

paid the American Company the price which the American Company had set as the value it demanded to receive in exchange for the parting with title. If this did not constitute a sale then there probably never was a sale consummated.

This test of the practical interpretation of a contract by parties while they were engaged in its performance and before any controversy concerning it had arisen, is one of the most satisfactory tests of its meaning.

> *Guarantee Trust Company of New York* vs. *Kochler* (195 Fed., 669-679).
>
> *Frankfort Broom Company* vs. *Western Warehouse Company* (200 Fed., 398-399).
>
> *Nelson* vs. *Ohio Cultivator Company* (188 Fed., 620-623).

Very recently this court has gone behind the language employed by parties in their contracts and, looking at the true purpose and intent of the contract, has worked out a situation entirely different than any which could have been ascertained on a strict literal construction.

> *Dr. Miles Medical Company* vs. *John D. Park Sons Company* (220 U. S., 373; 31 Sup. Ct. Rep., 376).
>
> *John D. Park Sons Company* vs. *Hartman* (153 Fed., 24; approved in the *Miles* case, *supra*).

And so, construed either literally or in the light of

surrounding circumstances, the legal effect of the contract under review was to vest title to the goods in the bankrupts and they were the vendees of the same.

POINT IV.

The Circuit Court of Appeals erred in holding the arrangement to be valid as a conditional sale. Assuming the arrangement to be a conditional sale, yet it cannot be upheld, because it allowed the vendee to deal with the goods in a manner inconsistent with the continued ownership of the vendor.

The majority opinion of the Circuit Court of Appeals contains this:

> "The transaction regarded either as a consignment or as a conditional sale to Horowitz and Company was entirely legal as against their creditors" (Rec., p. 227).

We have already shown a few of the insuperable objections to regarding this as a consignment arrangement. We now submit that a positive rule of law prevents its validity, as against Horowitz' creditors, if viewed as a conditional sale.

It is not necessary for the plaintiff to invoke any statute in this case. The rule applicable to this case is that any security arrangement, whether chattel mortgage or conditional sale, whether recorded or not, that allows the debtor to deal with the property as his own

while the lien lasts is void as against the creditors of the debtor.

In re Garcewich (115 Fed., 87).
Skilton vs. *Codington* (185 N. Y., 80).
Robinson vs. *Elliott* (22 Wall., 513).
In re Wells (140 Fed., 752).
In re Penny and Anderson (176 Fed., 141).

In New York all practical distinctions between chattel mortgages and conditional sales were obliterated long ago by the statutes conferring on the vendee what practically amounts to an equity of redemption (*N. Y. Pers. Prop. Law*, § 65; *Crown &c. Co.* vs. *Liq. &c. Co.*, 154 App. Div., 373). No distinction, in the present regard, therefore, can be made between it and a chattel mortgage, for both are security arrangements, and the rule in question is meant for all such arrangements. That is the well established law of New York, as the Courts in that Circuit have frequently held, and that law Federal Courts in that Circuit have hitherto applied in its full vigor. *Any conditional sale or chattel mortgage has the effect of allowing the debtor to deal with the property as his own if it permits him to sell the goods at whatever price he pleases and allows him to do anything with the proceeds other than turn them over to the mortgagee or vendor.* (*In re Garcewich*, 115 Fed., 87; *In re Penney and Anderson*, 176 Fed., 141), so if it permits him to retain even the expenses of his business out of the proceeds (*Skilton* vs. *Codington*, 185 N. Y., 80). To be valid against the vendee's creditors it

must require that the identical moneys received from each sale be turned over to the vendor as and when it is collected, in extinction of the debt, and without deduction for any purpose of the vendee's convenience.

Edgell vs. *Hart* (9 N. Y., 213).
Russell vs. *Wynne* (37 N. Y., 591).
Skilton vs. *Codington* (185 N. Y., 80).
In re Garcewich (115 Fed., 87).
In re Howland (109 Fed., 869).
Ludden vs. *Hazen* (31 Barb., 650).

The validity of the arrangement under review as against the bankrupts' creditors is to be determined entirely by the law of New York where the transactions occurred.

Dooley vs. *Pease* (180 U. S., 126).
Thompson vs. *Fairbanks* (196 U. S., 516).
Humphrey vs. *Talman* (198 U. S., 91).
In re Marine, &c., Dry Dock Co. (144 Fed., 649-652).
In re Garcewich (115 Fed., 87).
In re Howland (109 Fed., 869).

Nor is the case of *Walther* vs. *Williams Mercantile Co.* (169 Fed., 270) cited by appellees below, of value, because the opinion there professedly deals with the validity of the device under the law of the State where it originated. The question is one of local law for the Federal Courts to apply as they find it.

The Federal Courts in the Second Circuit have already stated that law in *In re Garcewich* (115 Fed., 87). COXE, J., has stated it in *In re Howland* (109 Fed.,

866), and so has Judge RAY (*Pontiac Buggy Co.* vs. *Skinner*, 158 Fed., 858).

The New York rule may thus be explained:

A chattel mortgage or a conditional sale secures a debt, the debt being owed in the one case for a loan and in the other for the purchase price, and in either case the debtor has no legal title to the property (*Cole* vs. *Berry*, 42 N. J. Law, 308).

The New York cases start with the proposition that possession of goods should accompany ownership; hence the separation of the two is often presumptively fraudulent, and where they are separated and also the possession is coupled with such a right of dominion as a power of re-sale, given in advance by the one in whom the title is vested, the vesting of such power renders the whole transaction fraudulent, *as matter of law*, as against the other creditors of the debtor.

> "The existence of such a provision out of the mortgage or in it would invalidate it as matter of law."
>
> *Edgell* vs. *Hart* (9 N. Y., 213).
> *Skilton* vs. *Codington* (185 N. Y., 80).

That leads to this, that the creditor should not permit the debtor to re-sell the mortgaged property. There is only one purpose for which such permission can properly be given, and that is so that the creditor may immediately receive all of the proceeds of the sale to extinguish the debt which the goods secured. In other words, the New York rule permits such privilege of re-sale only by way of a short foreclosure of the mortgage, or, as described in one of the decisions, the

agreement is valid only if it simply creates the debtor as the agent of the creditor to do what the creditor himself could do, viz., "*make immediate and direct application of property of this description, when it is mortgaged, to the payment of the debt*" (*Conkling* vs. *Shelley*, 28 N. Y., 360, 363). If any permission other than this is given to the debtor, if he is anything other than the mere agent of the creditor to sell the goods and treat the proceeds as the creditor's money, to be immediately and directly turned over to him, such permission renders the lien fraudulent as matter of law as against the other creditors of the debtor.

This is illustrated by the case of *Brackett* vs. *Harvey* (91 N. Y., 214) where the debtor was permitted to resell for credit as well as for cash, but was obligated to turn over all the proceeds, whether in notes or cash, to the creditor except such portion as would be necessary to purchase replacing property, which, in turn, should become subject to the lien of the mortgage. This was held valid because it did not essentially conflict with the proposition laid down in the earlier cases, the debtor being merely agent of the creditor. But the courts of New York have always shown a disposition, so far from extending this exception, to limit the cases strictly within its lines. In the latest case of *Skilton* vs. *Codington* (185 N. Y., 80) it was held that if the debtor can reserve from the proceeds of the sales enough money to meet the expenses of the business, the arrangement is inconsistent with the lien of the creditor, and is fraudulent as against the debtor's trustee in bankruptcy. CULLEN, C. J., for the Court, said:

"The agreement now before us goes a step fur-

ther than that in the *Brackett* case. It does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus after deducting the expenses of carrying on the business. * * * The purpose and intent of the agreement between the parties is plain on its face. The mortgagor was to conduct the business for the term of five years in the same manner as if he was the absolute owner of the stock in trade, selling and buying stock at his pleasure and discretion and paying the expenses of the business out of the sales, while if at any time he should be unsuccessful and be pressed by his creditors, the whole stock was to be subject to the lien of the mortgage as against the creditors from whom the very goods might have been purchased. No case in this State has gone to the extent of upholding such an agreement, and, in our opinion, it is fraudulent and void as a matter of law."

Skilton vs. *Codington* (185 N. Y., 80, 89).

The same rule was established by this Court, as a matter of sound principle, in a case where, the State law not having been shown, it was free to follow its own views.

Robinson vs. *Elliott* (22 Wall., 513).

The same rule has been stated by the lower Appellate Court, in a case which has been cited and followed in many other jurisdictions, *In re Garcewich* (115 Fed., 87). In that case a conditional sale agreement was made which provided that the vendee could sell and dispose of a line of wearing apparel at such prices as he might desire, paying to the vendor at stated intervals fixed prices which were provided for at the time of each delivery of goods. The referee and the

District Judge both held that this agreement was a conditional sale agreement, giving respect to the provision that the title to the property should not pass until either the goods had been sold to third persons by the vendee or payment made by him to the vendor. But the Circuit Court of Appeals reversed this determination, saying through WALLACE, J.:

> "When the purpose for which the possession of property is delivered is inconsistent with the continued ownership of the vender the transaction will be presumed fraudulant as against purchasers and creditors. The transaction will be deemed merely colorable and the title to have been vested absolutely in the buyer."

This case has been cited as law in many other circuits. In Maine (*In re Perkins*, 155 Fed., 237); North Carolina (*Mitchell* vs. *Mitchell*, 147 Fed., 280); in Oregan (*In re Rasmussen*, 136 Fed., 704); in Iowa (*In re Hickeson*, 162 Fed., 345), and in Illinois (*In re Galt*, 120 Fed., 443), the District Courts have given it their approval. It has also been approved by the Circuit Court of Appeals of the Seventh Circuit (*In re Gilligan*, 152 Fed., 605).

The facts in the present case are undisputed and both of the lower courts so treated them. The facts being clear, the question is purely one of law. The fraud is adjudged to be such "as matter of law" (*Skelton* vs. *Codington*, 185 N. Y., 80). As is said in the pioneer New York decision:

> "The law adjudges that they intended what the writing expresses; and it would be incompetent for either party to show, if they were possessed of the

most persuasive evidence, that they designed the instrument to have a different operation from the one the law assigns to it. * * * My own opinion is that the existence of such a provision out of the mortgage or in it would invalidate it as matter of law, and that where the facts are undisputed this court should so declare. The manifest tendency of such arrangements to defraud creditors by giving to the mortgagor a false credit, and their incongruity with the just and legal idea of a mortgage are in my mind sufficient to condemn them."

Edgell vs. *Hart* (9 N. Y., 213).

The same view was adopted by this Court in *Robinson* vs. *Elliott* (22 Wall., 513), to which reference has already been made. Nor can any profit be derived by the appellees from the statement of Judge HOUGH that there is no evidence of actual fraud in the case (Record, p. 211). For the undisputed facts in this case we have the written agreement of the parties, and we have their conduct, which shows the interpretation they placed on their agreement. The question is, therefore, not what the parties intended but did not express, but what their conduct showed they intended. Such an arrangement as described in this case has been classed as fraudulent in all the cases. Thus, in *In re Carcewich* (115 Fed., 87), it is described as presumptively fraudulent. In *Edgell* vs. *Hart* (9 N. Y., 213), the Court says, as we have seen, that the manifest tendency of such arrangements is to defraud creditors by giving to the mortgagor a false credit, and of the same opinion was this Court in *Robinson* vs. *Elliott* (22 Wall., 513).

The fact that in this case the Woolen Company acted

under advice of counsel cannot prevent its suffering the consequences of its fraudulent acts. To go further into this analysis would mean a discussion of ethics and not equity, which after all, however it originated in conscience, is administered through the medium of rules. People must be held to the natural consequences of their acts, however strong might be the inward justification. And if the facts appear which, under well settled rules, justify the conclusion of fraud, then, however the Court may find that there was no volition of fraud, the case is one of fraud, and the consequences must follow. A case precisely in point is the following, where it is said by EARL, J.:

> "The Statute (2 R. S., 137 §4) provides that the question of fraudulent intent in cases of this character 'shall be deemed a question of fact and not of law;' and the claim is made that here there is no finding by the referee of a fraudulent intent, but that on the contrary he has found the whole transaction to be fair and honest. He has, however, found facts from which the inference of fraud is inevitable, and, although he has characterized the transactions as honest and fair, that does not make them innocent nor change their essential character in the eyes of the law. Mr. Burr must be taken to have intended the natural inevitable consequence of his acts, and that was to hinder, delay and defraud his creditors."
>
> *Coleman* vs. *Burr* (93 N. Y., 17, 31).

The present case comes exactly within these authorities, if this arrangement is considered a conditional sale. As we have already shown, the arrangement permitted the Horowitzes to sell the goods at whatever price they pleased. All they had to do was to pay to

the American Company the invoice prices at which the latter had billed the goods to them. That was the debt they owed, for which the goods stood as security. They could, as they pleased, pay that debt out of their own pocket or out of the proceeds derived from the sale of goods.

When goods were sold, the proceeds were not paid over to the American; instead they went into the Niagara bank account. *But that account was not the American's, because the latter could not get money out of it without the counter-signature of Joseph Horowitz, as the Niagara's president.* When Horowitz thus checked money out to the order of the American how was this done? Were all proceeds of each sale turned over to the American in extinction of that portion of the debt which the particular goods sold had secured? Were these proceeds paid over as and when received? Were the proceeds segregated with respect to each sale, so that the debt owing the American for the goods which had thus been sold might be extinguished with the proceeds of the sale? *All of these questions suggest themselves, in view of the rule we have been examining, but the record answers none affirmatively.*

On the contrary Judge HOUGH's findings are as follows:

"Thus far Niagara Company had no quick assets and no working capital. Regarded as a separate corporation it had no machinery at all for carrying on a mercantile business. Obviously, there must be some means provided for doing this, and it was accomplished by

acting upon a communication from Philip Horowitz received at an adjourned meeting of the Niagara's incorporators held at the offices of the Woolen Company, on November 25, 1902. Mr. Horowitz offered in writing 'to pay all the expenses of doing business for the Niagara Woolen Company in consideration of the sum of $1,200 monthly, to be paid out of the earnings of the corporation.'" This offer was accepted, and thereafter and until the early summer of 1904, Philip Horowitz was paid this monthly amount usually if not with regularity. * * * The expenses of this business were to be paid by Philip Horowitz, and his obligation in form was to pay all the Niagara's expenses no matter what they were, in consideration of $1,200 a month out of the "earnings" of that concern. If there were no earnings he had no claim to this monthly payment, but his obligation to pay the expenses of the business remained in force. * * *

"The business thus conducted was visited almost daily by the Secretary and treasurer of the Niagara Company (a clerk of the Woolen Company whose duties consisted in examining the sales book), and with the consignment (*Sic*) of Joseph Horowitz *taking out of the Niagara Company's bank account as much money as the account would stand without undue depletion.* After the payment of attorneys fees for the formation of the Niagara Company the only checks ever drawn out of its bank account were either in favor of the Woolen Company or in favor of Philip Horowitz for the $1200 a month above alluded to.

No dividends were paid on the Niagara's stock nor are any earnings of that company shown in excess of said $1,200 per month, while in the early summer of 1904 these payments were stopped, because, in the opinion of the secretary and treasurer, the "earnings did not warrant them'" (Rec., pp. 207, 209).

To take this case out from the rule above stated, the appellees should have shown that each sale made by Horowitz stood on its own bottom, the invoice price being turned over to the American by way of the Niagara bank account and the profits only being retained by Horowitz. The facts as found by Judge HOUGH are to the contrary (Rec., pp. 207, 209).

Instead of the proceeds of sale being remitted to the American Company in extinction of the amount owing the American upon the goods thus sold, all sales money was massed in the Niagara bank account. That account was just as much Horowitz' as it was the American's, because neither could check out of it alone. No accounting was ever made, but instead, on the first of every month a round amount from the Niagara account was taken out by the American, and at the same time $1,200 was taken out by Horowitz, who in turn stood all the expenses of the business (Rec., p. 74). *So far from the vendee paying over all money received by him in extinction of the purchase price without any deduction, the American drew on the first of each month an arbitrary portion of the money received and Horowitz drew an arbitrary amount of $1,200.* True, the theoretical agreement was for Horowitz to pay the expenses of the business in consideration of $1,200 a month out of the

earnings, but those earnings in effect went to meet the expenses of the business. *No accounting was ever had (Rec., p. 115), no dividends were ever declared as evidence that any profit had ever been earned,* and that the business was losing money is evidenced by the fact that finally and shortly before the failure, this monthly allowance was entirely stopped. In short, there was nothing to ensure it that this $1,200 allowance should represent current profits only, and it appears that in fact it did not. *The arrangement in question was really made, as Judge Hough finds, only to give a fictitious machinery to carry on a fictitious business, and not to secure the American from the rule above mentioned. That rule was to be avoided, as the parties intended, only by creating a fictitious vendee, and not by an honest compliance with its requirements.*

The majority opinion of the Circuit Court of Appeals thus takes the present case from under this positive rule of law :

> "The agreements which we have had under consideration are contracts of an entirely different character and contain elaborate provisions to prevent the consignee from consuming the goods or selling them and applying the proceeds to their own use" (Rec., p. 227).

With great respect we ask, where are those elaborate restrictions which neither Judge HOUGH nor Judge LACOMBE could find? What elaborate restriction prohibits Horowitz from consuming the goods? Absolutely nothing. He could at any time consume

them, and all he would have to do, under the express agreement, would be to pay the invoice price to the American Company. Under Clause V of the agreement (quoted in Judge WARD's opinion, Rec., p. 226), Horowitz agrees, "in case any merchandise * * * is not accounted for * * * to pay to the party of the first part the invoice price of such merchandise." Of course he must pay for what he consumes, but he is absolutely free to consume it, leaving himself indebted for the purchase price. Where is the "elaborate provision to prevent the consignee from comsuming the goods?" We challenge our adversaries to show it.

And where is the elaborate restriction to prevent Horowitz from selling the goods and applying the proceeds to his own use? True the proceeds of sales were supposed to go into the Niagara bank account, that "clumsy sort of cash box" to which Judge WARD refers (Rec., p. 227). But the more material inquiry would seem to be, What came out of the cash box, and into whose hands did it go? And when we touch that point, Judge WARD's reasoning fails, because, as we have shown above, *in effect Horowitz was allowed to use, out of this cash box, $1,200 a month and the American in turn drew a round sum, with no accounting of any sort* (Rec., pp. 74, 115).

The trouble with Judge WARD's reasoning was that it did not go far enough. He considered that a conditional sale arrangement to be invalid must permit the vendee to apply all the proceeds of sale to his own use. But the law of New York, which applied to the case, interdicts the transaction if it permits the vendee to ap-

ply any part of the proceeds of sale to his own use, even such part as merely equals the expenses of his business, much less a profit on resale. The vendor must provide that nothing is retained out of the proceeds of sale, but that they should immediately pass to the vendor to the extent of the debt owing him. That was laid down by the New York cases ending with *Skilton* vs. *Codington* (185 N. Y., 80), already discussed, and that is the present case.

As a matter of fact, we fail to find any elaborate safeguards to protect even this sort of cash box arrangement. The whole theory of the Niagara being merely a cash box was formulated by counsel for the defense when the case lay in the Circuit Court of Appeals. In the District Court quite another use was made of the Niagara Company. The defense then argued that the Niagara, so far from being a cash box was a separate entity, with which the American solely dealt and contracted, so that the creditors of Horowitz could make no claim to the goods, whatever was the nature of the transaction (see opinion of HOUGH, J., Rec., p. 212). *So secure did the parties who concocted the original arrangement feel in this theory that they made no effort even nominally to comply with the rule of law above discussed; they rested everything on the theory of the Niagara's independent personality.* But Judge HOUGH demolished this theory so effectively that on the appeal it was practically abandoned, and the cash box, or safeguard, idea was substituted. This latter theory accords neither with the facts attendant upon the Niagara Company's origin nor

with the facts relating to safeguarding. The Niagara Company was not organized for a safeguard, and it was not one. It was organized solely to circumvent the decisions, holding these agreements to be invalid as against the vendee's creditors, by creating a fictitious vendee whose title, it was believed, would avail against Horowitz' creditors. This is made plain by the witnesses called by the defense.

Hartough, a bookkeeper, whose salary was paid by the American Company, was in charge of the books of the Niagara. But in keeping these books he testifies he was entirely dependent upon the Horowitz partners for information on which to base his entries (Rec., pp. 122–3). The Horowitz partners opened all mail (Rec., p. 123), and made all bank deposits (Rec., pp. 124–6) They paid all expenses of the business, receiving equal amounts from the Niagara bank account (Rec., p. 74). Hartough admits that "*there was nothing to prevent the Horowitzes, or any salesman of theirs, from selling Niagara Woolen Company goods as their own, not telling him anything about it, and pocketing the proceeds*" (Rec., pp. 128–9). While auditors came every little while from the American Company to examine the Niagara Company's books, all the information they could get from these books in reality, as above said, originated with the Horowitzes (Rec., pp. 122, 128–9). Dawber, an American official, who was nominally treasurer of the Niagara, admits that he never presented a report as treasurer, that the interest and discounts were never calculated *and that*

right now he cannot ascertain from its books how much was owing to the American Company at the time of the failure (Rec., p. 115). Often cheques were sent in from purchasers, drawn to the order of Horowitz (Rec., pp. 75-6). When that happened Horowitz would deposit the cheque in his own account (Rec., pp. 73-4) and deposit his own cheque to the credit of the Niagara account (Rec., pp. 74-6). At least that is what theoretically happened. But there was no way of checking him on this, by reason of his complete charge of the mails, the bank accounts, and the sources of information from which the Niagara books were kept. The very books were kept in a safe to which Horowitz alone had the key (Rec., p. 122).

If the American had desired merely safeguards, it needed nothing more elaborate than its original custom. Under its original agreement with the Horowitzes, the latter agreed "to make all bills of said consigned goods payable to" the American Company (Rec., p. 141). Then the proceeds of re-sale, without deduction, would go in extinction of the original debt, as the law of New York requires. But when the Niagara was formed, no such agreement was made, and bills were rendered in the name of the Niagara (Rec., p. 75) which, in turn, was thoroughly under the Horowitz' control. The Niagara was never conceived, we submit, for any such simple purpose as a safeguard.

POINT V.

The corporate identity of the Niagara Woolen Company cannot operate to defeat the claims of the creditors of Horowitz as above discussed.

So far we have discussed this matter as though the consignment arrangements had been made by the American Woolen Company direct with Horowitz & Son. It was, however, argued by the appellees in the District Court that whatever may have been the conclusion had this in fact been the case, still the fact that the arrangements of the American Woolen Company were made with the Niagara Company defeats all the reasoning above expressed. The position of the appellees, in other words, was that the creditors whom the complainants represent are the creditors of the Horowitzes; and that as all of the dealings with the American Woolen Company were with the Niagara and not with Horowitz, the whole matter is academic.

This reasoning of the appellees, and the whole history of the Niagara's formation, is an excellent argument in support of the preceding points of this brief.

If the "consignment" arrangement which the American really desired with the Horowitzes was valid, of what use was the Niagara?

The appellees' argument, of course, would be true if the creation of a corporate entity can in all cases over-

come the legal effect of facts. But we understand the law to be as thus expressed by Judge NOYES:—

> "The legal fiction of distinctive corporate existence will be disregarded when necessary to circumvent fraud. It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality and adjunct of another corporation" (*In re Watertown Paper Company*, 169 Fed., 252).

The trial Court referred to the Niagara Company as a "transparent window," and ignored its proper existence, and in this the presiding Judge of the Appellate Court concurred. When they argued the case in the Circuit Court of Appeals, counsel for the American Company could think of no excuse for its existence other than to say that it acted as a sort of cash box for the American Company and a check on the transactions of the bankrupts. The majority of the Appellate Court touched on its existence only once in the course of their opinion, and then to say: "The purpose of this clumsy interposition of the Niagara Company was, as counsel for the American Woolen Company points out, that it should be a sort of cash box for the Woolen Company and check on the transactions of Horowitz & Company."

We have already dealt with the cash box theory in another part of this brief, and the separate entity theory has failed to receive the sanction of any of the judges who have sat in the case. The following observations though probably superfluous, are however inserted for what they may be worth, with respect to any idea that

might be otherwise entertained as to the relative importance of the Niagara Company as a factor in this case.

The facts relating to the Niagara's origin and subsequent existence are detailed in our statement of the case, (supra pp. 3–24) and are also in part mentioned in the preceding argument (supra pp. 77–8).

To use the language of *In re Watertown Paper Company* (169 Fed., 252) the Niagara was merely an instrumentality or adjunct of the American Woolen Company to use in the event of the insolvency of the Horowitzes, but during the meanwhile the Horowitzes were the persons who were considered as the real parties in interest. This is brought out very strikingly in the letter of Murphy to the Horowitzes following a discussion over changing the discount rate. The final result was the memorandum of Murphy as expressing the agreement arrived at between the parties, which states as follows :

> "Sales to be made on terms of 8/60 days; we accept payment on account of sales on average due date interest to be charged. * * * *Credit Phillip Horowitz & Son* with 2% on net amount of sales." (Rec. p. 72).

In *In re Garcewich* (115 Fed., 87) it was decided that an arrangement of the kind described in the previous points of this brief is a fraud on the creditors of the vendee. That decision is the reason of the Niagara's creation. To circumvent the fraud thus attempted Judge HOUGH disregarded the corporate entity. The affairs of the Niagara were so conducted and it was so

organized and controlled as to make it merely an instrumentality or adjunct of another. Whether that other be called the American Woolen Company or the bankrupts, it matters not. The point is that as appears by all the evidence the Niagara Woolen Company was created solely to avoid what would otherwise have been the consequences of a "consignment" transaction between the American Woolen Company and Horowitz & Son as it was actually conducted. This the Courts do not allow.

Cook on Corporations (6th Ed.) § 663.
In re Muncie Pulp Co. (139 Fed., 546).
In re Rieger (157 Fed., 609).
Holbrook vs. *Perkins* (147 Fed., 166).
Brundred vs. *Rice* (49 Ohio State, 640).
Banks vs. *Trebein Co.* (59 Ohio State, 316).
United States vs. *Milwaukee Refrigerator Trans. Co.* (142 Fed., 247).
Booth vs. *Bunce* (33 N. Y., 139).

The doctrine of these cases has been stated by the Circuit Court of Appeals for the First Circuit as follows:

> "It is quite true that individuals are permitted to form corporations for the purpose of conducting business with a limited individual responsibility. It is not true that individuals are permitted to form corporations solely for the purpose of avoiding ordinary legal liabilities."

Holbrook vs. *Perkins* (147 Fed., 166, 169).

A short way of bringing up this entire matter would have been for the creditors of Horowitz & Son to move

to extend the receivership in bankruptcy to the goods held by the Niagara Company. The prompt removal of these goods by the American frustrated such action, but if it had been possible the precedure would have been upheld.

In re Muncie Pulp Co. (139 Fed., 546).
In re Rieger (157 Fed., 609).

In such a case the Court, after referring to the fact that the dummy corporation was undoubtedly a mere creature of the Pulp Company, having no independent business existence and organized simply for the purpose of facilitating the business of the latter, concluded that to permit the dummy corporation to dispose of the property for the benefit of certain outsiders "is to sanction a fraud upon the creditors of the Pulp Company" (*In re Muncie Pulp Company*, 139 Fed., 546).

In the present case the idea was to circumvent the decision in *In re Garcewich* (115 Fed., 87). In other words, it was to sanction an arrangement which otherwise would be unlawful. That being so, the creditors of Horowitz & Son are entitled to the same remedies as though this attempt had not been made, and therefore the corporation and what would otherwise be its corporate rights may be disregarded by a court of equity. Thus in *Holbrook* vs. *Perkins* (147 Fed., 166) where a corporation which was about to undertake some construction work, organized a subordinate company for that purpose, in order that if people were injured through negligence, the subordinate company which had no assets would be the only

person which could be sued, the Circuit Court of Appeals for the First Circuit held that the original corporation which was benefiting by the work done by the minor company was liable directly in an action at common law based upon the negligence of the minor company. The Court said :

> " Assuming the valid creation of the Alantic Construction Company as a distinct corporation—assuming the regularity in point of form of the execution of a document which purported to be a contract between two corporations, there was still open the question whether there was in fact, as distinguished from mere form, a contract—whether these were in fact, as distinguished from form two distinct parties making an agreement upon mutual considerations."
>
> *Holbrook* vs. *Perkins*, (147 Fed., 166, 169).

In a case decided in the Sixth Circuit, it appeared that a partnership did business in New York and Ohio. Their business in Ohio they operated under the name of the corporation of which they held practically all the stock. It was held that a receiver of the partnership appointed in this Circuit was entitled to the assets of the partnership of the corporation in Ohio. The Court, in citing the decision of this Court *In re Muncie Pulp Co.* (*supra*), said:

> " The doctrine of corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."
>
> *In re Reiger* (157 Fed., 609).

A recent English case is highly illustrative. As

we have seen, a sale agreement of the kind at bar, would have been "presumptively fraudulent" as against Horowitz's creditors, if Horowitz had been the contracting party (*In re Garcewich*, 115 Fed., 87). It is equally a case of presumptive or constructive fraud for the promoter of a company to conceal from the latter or its prospective shareholders any facts relating to the profit he is to gain from the promotion. To avoid this presumptive fraud in the case at bar the parties operated behind the corporate entity of the Niagara, which was erected for that purpose. To avoid the presumptive fraud in the English case two promoters organized an "investment company," of which they held all the stock. This "investment company" then promoted the sale of a quarry to a company to be formed for that purpose. This sale was made at a large profit to the "investment company," which distributed the same in dividends to the two promoters. The prospectus of the quarry company truly stated the amount of profit to be made by the "investment company," but failed to state more than that the "investment company" was the promoter. Subsequently the quarry company failed; later the promoters failed. It was held that the liquidator of the quarry company could disregard the entity of the "investment company," and prove direct against the promoters' estates for the whole of the profits they had made, because the true identity of the promoters had not been disclosed. PHILLIMORE, J., said that the promoters intended the investment company as "merely an alias for themselves just as much as if they had announced in the 'Gazette' that they

were in future going to call themselves Rothschild & Co. It was merely a name under which they carried on business."

Re Darby (1911, 1 K. B., 95, 101).

The principle of these cases cannot be disregarded. Judge HOUGH on this head said:

> "In this branch of the case I find no difficulty, although no similar litigation has been instanced" (fol. 983).

But the principle of the cases cited fully applies and in this case, as in all others of fraud, the words of Lord MANSFIELD have their place:

> "In all its circumstances, therefore, there is perhaps no case exactly similar to it. But the law does not consist in particular cases, but in general principles which run through the cases and govern the decision of them. The general principle applicable to the present case is this, that a fraudulent contrivance, with a view to defeat the bankrupt laws, is void and annuls the act. This principle is established by many cases" (*Rust* vs. *Cooper*, 2 Cowp., 629).

In the words of FINCH, J., the Court should

> "refuse to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth" (*Anthony* vs. *Am. Glucose Co.*, 146 N. Y., 407, 413).

We submit that the truth, which the Niagara's technical life should not be allowed to hide, is, as stated by Judge HOUGH, that "the whole and avowed meaning and intent of the arrangement was not to consign goods

to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them" (Rec., p. 214). The District Court held that that design had failed, and, we think, rightly.

POINT VI.

The judgment and mandate of the Circuit Court of Appeals should be reversed, and the decree of the District Court affirmed, with costs.

Dated October 15, 1913.

Respectfully submitted,

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1913. No. 55.

CLIFFORD J. LUDVIGH, AS TRUSTEE IN BANKRUPTCY OF PHILIP HOROWITZ AND JOSEPH HOROWITZ, INDIVIDUALLY AND AS COPARTNERS, ETC.,

Appellant,

against

AMERICAN WOOLEN COMPANY OF NEW YORK AND NIAGARA WOOLEN COMPANY,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

DANIEL P. HAYS,
Solicitor for Appellees.

DANIEL P. HAYS,
EDWIN D. HAYS,
Of Counsel.

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1913.—No. 55.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the estate and effects of Philip Horowitz and Joseph Horowitz, individually and as copartners, etc.,

Appellant,

AGAINST

AMERICAN WOOLEN COMPANY OF NEW YORK and the NIAGARA WOOLEN COMPANY,

Appellees.

BRIEF FOR APPELLEES.

This is an appeal from a judgment of the Circuit Court of Appeals for the Second Circuit, reversing a judgment of the District Court for the Southern District of New York in favor of the appellant and against the appellee for the sum of $52,668.19 (p. 229).

The action was brought by the appellant, as trustee in bankruptcy of the firm of Horowitz Bros. and of the individuals composing said firm, to recover certain property claimed to have been received by the appellee, American Woolen Company of New York, pursuant to a scheme entered into between it and the bankrupts to hinder, delay and defraud the creditors of the latter.

The bill of complaint (pp. 2–25) is framed upon the theory that the appellee, American Woolen Com-

pany of New York (hereinafter called the "Woolen Company") and the bankrupts secretly entered into a fraudulent scheme to defraud the creditors of the said bankrupts, by forming a "dummy" corporation, the appellee Niagara Woolen Company (hereinafter called the "Niagara Company") and making paper agreements which in fact were not and were not intended to be carried out, and that the purpose and object of such fraudulent scheme was to present and extend to all creditors of the bankrupts, both existing and subsequent, an apparent ownership on the part of the bankrupts of the woolens supplied by the Woolen Company, in order that, on the faith of such ostensible ownership, the creditors would be induced to continue extending credit to the bankrupts as before.

That, pursuant to such scheme, the bankrupts made sales and collections in their own name.

That the proceeds of sales were intended to belong to the bankrupts and that they deposited them in their own bank account.

The demurrer to the bill was overruled upon the supposition that the appellant would prove the allegations above referred to.

> See Opinion, Judge Hough, *Ludvigh* vs. *American Woolen Co.*, 159 Fed., 796.

At the trial, the appellant did not prove any actual fraud as alleged in the bill of complaint. He recovered on the theory that the transactions, though honestly intended, were fraudulent at law (pp. 204-215). The Circuit Court of Appeals reversed the judgment by a vote of two to one (p. 228).

Both courts were unanimous in finding that the parties acted in good faith, and that the motives of the Woolen Company in entering into the agreements and conducting the business are unimpeachable (pp. 211, 224).

The appellant in his brief recognizes the binding force of this finding, in that he does not question it

by express words. It seems to us, however, that he has nevertheless endeavored, by the manner in which he has edited his brief, to create an impression that the appellees did not act in good faith. He has made statements insinuating that the appellees' motives were fraudulent.

Instead of answering each of the insinuations contained in appellant's brief, we shall at the outset call the court's attention to the unanimous finding of the courts below on the question of the honesty of the Woolen Company's motives.

The learned Judge who tried the case, and who found in favor of the appellant, stated in his opinion:

> "It may be admitted, and is found, that there was no actual fraud on the part of anyone in the sense either of suppression of truth or suggestion of false practice upon creditors" (p. 211).

He also found (pp. 210, 211) that:

> "The bill of complaint correctly alleges the main features of the plan above set forth, but it also asserts (in substance) that with the knowledge and connivance of the defendants, and especially of the officers and agents of the Woolen Company, that Horowitz & Son sold the 'consigned goods in their own name and rendered bills in their own name and made collections accordingly,' and that in most instances the proceeds of such sale were placed by the bankrupts 'in their own bank account,' so that, in effect, the bill charges that however legally good *inter partes* the paper scheme was, it was also from the beginning or nearly so practically disregarded, and is now used and was always intended to be used only as a protection in time of need; while ordinarily the Horowitz firm, with the knowledge and consent of the Woolen Company, transacted their business, sold goods, and made collections therefor, exactly as if they had bought all the goods in their store for cash or credit in the ordinary way. This, as above sufficiently indicated, I do not believe to be

> true. *There is no evidence of any actual fraud on the part of the Woolen Company;* on the contrary, the evidence is clear that that corporation, acting under the advice of counsel, perfected this plan in order to avoid suspected dangers in doing business with Philip Horowitz. The plan was believed to be lawful, and was honestly adhered to until within a short time of failure, when Philip Horowitz more than justified suspicion by flagrantly violating his own agreements and becoming a fugitive from his creditors."

At page 210, he said:

> "There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure either from the letter or the spirit of the written agreements first above set forth."

The majority of the learned Circuit Court of Appeals and the learned Justice who dissented, agreed with the finding of the trial Judge, that the testimony in the case showed that the motive of the Woolen Company was honest, and that there was no evidence of any fraud in fact (p. 224). The only question thus left for discussion is whether the arrangement between the parties was fraudulent as a matter of law. This brings us to a statement of the facts.

Facts.

The American Woolen Company, shortly after its organization in the year 1901, began selling goods to the bankrupts (p. 59). On November 15th, 1901, it entered into a written consignment agreement with the bankrupts (Plaintiff's Exhibit 1, pp. 141, 142). All business between the parties for one year was to be subject thereto. The Woolen Company was to consign goods to the bankrupts. All bills for consigned goods were made payable directly to the Woolen Company. The bankrupts were to give

security by way of a lien on real estate, to protect the Woolen Company from loss which might be suffered by reason of their failure to observe the agreement (p. 141).

The dealings were, thereafter, had under the agreement. All bills for sales, made by Horowitz & Son to their customers, had printed thereon, in red ink, a statement that the amount was payable direct to the American Woolen Company of New York (p. 205).

In the year 1902 and shortly before the expiration of the aforesaid contract, the Woolen Company and its attorneys decided it advisable to enter into a different arrangement, and proceeded to form the Niagara Woolen Company and to enter into the agreements with it and the Horowitzes, which will be hereinafter fully discussed.

The object of the new arrangement was to more fully secure the title to the goods in the Woolen Company and the payment of the proceeds of sale to them, or as stated by the trial Judge, "to avoid suspected dangers in doing business with Philip Horowitz" (p. 211). This will be apparent as the details of the new plan of doing business are outlined. The change was not made, as stated by appellant in his brief, "to circumvent the decision *In re Garcewich*, 115 Fed., 87." There is nothing in the record to support the appellant's statement, except the words which the appellant's counsel, by his form of questions, attempted without success to put in the mouth of the witness Gallert (p. 48).

Under the Garcewich case, the old way of doing business was valid. Both the courts below seem to recognize this (pp. 205, 224). Furthermore, as stated above, both the courts below agree that the Woolen Company, in adopting the new arrangement, acted in good faith and without intention of doing anything wrong. It is evident that the Woolen Company in making the new arrangement intended so to change the actual situation of the parties that its title to the goods and the proceeds

thereof would be in no way at the disposition of the Horowitz's, and that it was not "attempting to circumvent any decision." Had the plan, under which the parties were dealing been considered as illegal, it would have been perfectly proper for them to change it as they did without being subject to any criticism, so long as the new plan was not intended to defraud creditors. And that it was not so intended has been expressly found in this case.

The Niagara Woolen Company was legally incorporated in November, 1902 (p. 41). It had a capital stock of $20,000, which was paid—$500 in cash, $100 each being contributed by two employees of the Woolen Company, Mr. Joseph Horowitz contributing the other $300. Philip Horowitz executed a mortgage to the Niagara Woolen Company for $19,500, covering premises Nos. 54-56 Eldridge Street, in The City of New York, in return for the remaining 195 shares (p. 41). The certificate of incorporation stated that the object of the corporation was to contract and deal with the American Woolen Company of New York and deal in fabrics received therefrom (p. 153). The Woolen Company retained to a large extent control over the Niagara Company. George H. Dane and Robert Hanlon, two employees of the Woolen Company, were designated as two of the three directors (p. 41); 197 shares of stock were pledged by Joseph Horowitz with Mr. Murphy, an employee of the Woolen Company, to secure the performance of the agreements hereinafter referred to (pp. 41, 15). Joseph Horowitz was made a director and president, and Thomas E. Dawber, another employee of the Woolen Company, was made secretary and treasurer (p. 41). The by-laws were carefully drawn that all monies were to be paid over to the treasurer and deposited in a Bank account in the name of the Corporation and that no money could be withdrawn except by the joint signature of the president and the treasurer (p. 157).

When the organization of the Niagara Woolen

Company was complete, a contract was at once entered into between it and the Woolen Company, which, in legal effect, was substantially the same as the consignment contract between the Woolen Company and the bankrupts then in force (pp. 13-15, 141, 142). There is, however, this essential difference:

The Woolen Company wanted to make it impossible for the bankrupts to in any way impair its title to the merchandise or its proceeds.

It evidently had less faith in their honesty than in their business ability, and that this lack of faith was justified, and the new arrangement necessary for the protection of the Woolen Company is shown by the subsequent dishonesty of Philip Horowitz.

It therefore organized a new corporation the "Niagara Woolen Company" which it controlled, with whom it made its contract, and to which al proceeds of sales were to be paid

This contract between the Woolen Company and the Niagara Company (pp.13-15) will be fully discussed hereinafter. Its essential features were: All merchandise delivered to the Niagara Company was to remain the property of the Woolen Company, to be subject to its control. Title was to pass directly from the Woolen Company to the purchasers. Goods were to be insured for the benefit of the Woolen Company. The Niagara Company was to sell the goods and turn over the proceeds of the sale, retaining whatever it realized over the invoice price, after deducting the usual discount. The Niagara Company guaranteed the accounts. The agreement was for a year, and on its termination the Woolen Company was to take back all unsold goods.

In order further to protect the Woolen Company, Phillip Horowitz & Son entered into an agreement with the Woolen Company and Mr. Murphy, Manager of the Woolen Company (pp. 15–18), by which they guaranteed the performance of the new ar-

rangement between the Niagara Company and the Woolen Company, and, as security for the agreement, transferred to Mr. Murphy, as trustee for the Woolen Company, 197 shares of the stock of the Niagara Company. Philip Horowitz also entered into an agreement with the Niagara Company, by which he agreed to pay the expenses of the business of the Niagara Company, in consideration of $1,200 to be paid him monthly out of the earnings of that corporation (pp. 18-20).

The Niagara Company had its office in the same place where Philip Horowitz & Son conducted their other business, which was largely the sale of silks (p. 105). A sign with the Niagara's name upon it was placed outside in addition to the sign of Philip Horowitz & Son (pp. 63, 83). The learned Judge found the sign was "reasonably conspicuous" (p. 208). In the back of the Horowitzes' store were three offices partitioned off. One of these was the office of the Niagara Woolen Company (p. 61). There, the books of the company were kept and the bookkeeper, Mr. Hartough, who was employed by the Woolen Company in behalf of the Niagara Company shortly after its formation, was located (p. 11). When goods were received for the Niagara Company from the Woolen Company, they were placed in the store.

The appellant devotes considerable space in his brief to showing that the goods consigned to the Niagara Company were mingled with the goods of Philip Horowitz & Son. It seems to us to be of little importance whether or not they were mingled, in view of the fact that there is no evidence that any creditor was misled thereby. Furthermore, it is apparent that the mingling was, to a large extent, without the knowledge of the Woolen Company. The testimony of Mr. Dawber, the treasurer of the Niagara Company, shows that all these goods were tagged with the tags of the Woolen Company (p. 106), and that the stock of silks of Philip Horowitz & Son was kept separate from the woolens (p. 105). Presumably, there were no other woolens there except

those of the Woolen Company, for, under the previous agreement between Horowitz and the Woolen Company, he had agreed not to purchase woolens elsewhere than from the Woolen Company (p. 142), and in the new arrangement with the Niagara Company, as pointed out by counsel for appellant, a similar provision was inserted (p. 14). Therefore although the witness Horowitz testifies that there were other woolens there besides those of the Woolen Company, there is nothing to show that the Woolen Company knew of this fact, and as far as Mr. Dawber could see, one side of the store was devoted to the woolens and the other side to the silks (p. 105). The fact that, on cross-examination, he could not say positively what was in the case or what tags were on every piece of goods is of little importance. As far as the Woolen Company knew, the woolens were kept separate from the silks and only its woolens were there.

The goods, consigned to the Niagara Company, were naturally sold by Mr. Horowitz, who was the president of the Niagara Company, and others acting in his behalf. This was the written arrangement. It is not accurate, however, to state, as does appellant's counsel, that there was no change in the method of doing business after the Niagara Company was formed, for, though the Horowitzes acted as salesmen, *it is undisputed that the goods were sold and billed in the name of the Niagara Woolen Company and the checks in payment thereof, with few exceptions, were made payable to the order of the Niagara Woolen Company* (p. 209). *They were deposited in the account of the Niagara Woolen Company* (pp. 119, 209). Any checks not payable to the Niagara Woolen Company, which were for goods sold by the Niagara Company, were at once endorsed over to the Niagara Company and deposited in its account (p. 76). This method of doing business was not departed from until the Horowitzes began to steal the checks and deposit them to their personal account, which, of course, was without

the knowledge and consent of the Woolen Company, as is evident from the testimony and is adjudicated by the judgment in the case of *Niagara Woolen Company* vs. *Pacific Bank* (Exhibit Y, pp. 179-203).

The goods, shipped to the Niagara Company by the Woolen Company, were billed upon the ordinary billhead of the Woolen Company (p. 23), but contained a statement plainly written thereon:

> "*These goods are delivered on consignment by the American Woolen Company of New York and are accepted by the Niagara Woolen Company upon the express condition that the title thereto remains vested in the American Woolen Company of New York until paid for*" (p. 23),

and the so-called orders for goods had written upon them:

> "*This is accepted and consideration shall be given in accordance with the agreement between us as of November 25th, 1902*" (p. 145).

Appellant's counsel makes considerable point of the other terms which were printed upon these bills and orders. The matter will be taken up more fully hereinafter. We merely wish, at this point, to call the Court's attention to the fact that the ordinary printed invoices were used, but that the terms applicable to absolute sales were not intended to apply, is evident from the special statements above quoted which were typewritten upon the bills and orders, so as to make them apply to this particular method of doing business.

The goods were billed to the Niagara Company at a certain price at which the Niagara Company was authorized to sell the same. They were not to sell for less than this price (p. 68). Certain discounts were allowed to the Niagara Company, these discounts being computed according to the time within which it turned over the proceeds of sale

which it collected as agent or consignee of the Woolen Company (pp. 14, 19).

The reference to the discounts in Exhibit "A" of the complaint is explained by an amendment to the agreement appearing at page 18 of the record, which settled the alleged controversy as to discount and which shows that the discounts, allowed under the agreement, were to depend, as above stated, upon the time within which the Niagara Company turned over the moneys to the Woolen Company. Had the contract been one of sale, the discount would have been figured from the time of the delivery of the goods to the Niagara Company, and not from the time of the sale.

The agreement in regard to "off-price" goods, which is claimed by appellant to be inconsistent with the consignment, is an agreement in regard to some of the special goods, called "seconds," which the Woolen Company did not wish to consign, as they might depreciate during a period of their consignment, and, therefore, before consigning them, they made Horowitz guarantee the Woolen Company from loss in case they were not sold and it had to take back the goods (p. 148).

The Woolen Company not only protected itself as aforesaid by having control of the board of directors of the Niagara Company, but, after business was commenced, kept a watchful eye over the affairs of the Niagara Company. Mr. Dawber, the Secretary and Treasurer of the Niagara Company, and an employee of the Woolen Company, called daily at the place of business of the Niagara Company and spent a short while glancing over the affairs of the company (101). Shortly after the company's organization, Mr. Hartough was employed by the Woolen Company as bookkeeper of the Niagara Company and was at the office of the Niagara Company daily, spending his entire time keeping the books of the Niagara Company (pp. 101, 117). Mr. Hartough, the bookkeeper, made monthly reports to the Woolen Company of the Niagara sales (p. 120),

and the auditors of the Woolen Company called once every month or two and went over the books of the Woolen Company (p. 120).

Counsel for appellant in his brief attempts to have it appear that the bookkeeper and auditors depended entirely upon the Horowitzes for their information. While this is naturally true to an extent, as Philip Horowitz was the president of the Niagara Company and had charge of making sales, still the bookkeeper and the Treasurer were there daily, acting in the interests of the Woolen Company, and must neces-arily have seen what was going on and have had general first hand knowledge of the transaction. In addition to this, the bookkeeper saw the checks, as they came in, and was thus enabled to keep track of the transactions (p. 118). Furthermore, the Woolen Company, twice during the period, had an inventory of the merchandise taken, thus checking up the reports of sales made by the Horowitzes (p. 129).

The proceeds of sale of the merchandise delivered to the Niagara Company (except what was stolen after May, 1904, by Philip Horowitz) came into the possession of the Niagara's Treasurer and were deposited in the Niagara Company's bank account (pp. 76, 77). Not one penny thereof went to either of the Horowitzes. They were paid the $1,200 per month out of the earnings of the Niagara in accordance with the agreement (p. 209). This $1,200 was only paid when there were earnings; when the earnings stopped the payment ceased (pp. 209, 77).

The company was conducted as any other corporation. It had its regular meetings. It is true Philip Horowitz testifies that he never attended a meeting. However, he is contradicted in this by the minutes which are offered in evidence (Defendants' Exhibits D to T, pp. 159-178), and which were testified to by Mr. Dawber, the Secretary of the Niagara Company, as correct (p. 107).

In October, 1904, the Woolen Company, acting under its contract, took back goods of the value of

$39,685.27, which it had delivered to the Niagara Company (p. 42). This action is brought to recover the value of said goods with interest, which at the time of the entry of the judgment in the District Court amounted to $12,798.50, making the total amount of the judgment $52,668.19.

The appellant in his brief attempts to show that the Woolen Company made a profit on the transaction, by reason of the fact that it realized $12,500 on a mortgage made to the Niagara Company. The fact, that it realized on this mortgage is immaterial, and the statements of the appellant in regard thereto are unfair, as are also the statements in regard to the recovery of the Niagara Company from the Pacific Bank. The Niagara Company merely recovered part of the amount, which had been stolen from it by the Niagara Company. How much else was stolen by the Horowitzes does not appear, nor does it appear what the state of the account between the Niagara Company and the Woolen Company was at the time of the failure, or whether the Woolen Company was made whole by retaking the goods. If it received more than it was entitled to, the same can be recovered in a proper action.

The learned trial Judge directed a judgment in favor of the appellant (pp. 204–215). He found, however, as above stated, *that the transactions were free from any actual fraud, and that the agreements entered into between the parties were honestly intended and honestly lived up to.* He decided, however, that, as a matter of law, the arrangement was not a consignment to the Niagara Woolen Company, but an absolute sale to Philip Horowitz & Son; that the Niagara Company could be disregarded. As he said, it was but another name for the American Woolen Company (p. 214).

It will be noted, on the other hand, that counsel for appellant disagrees with the learned Judge, in that he contends it was but another name for Philip Horowitz & Son.

The majority of Circuit Court of Appeals dis-

agreed with the learned trial Judge in the construction of the agreement between the Niagara Company and the Woolen Company (pp. 224–227). They considered it a valid consignment agreement, and further held that it was immaterial whether it was a consignment or a conditional sale. The clear intent was to keep the title in the Woolen Company, and there was nothing in the arrangement which was fraudulent in fact or in law.

The contention of the appellee is that the whole purpose and intent of the arrangement between the parties was to secure the American Woolen Company in its title to the goods and the proceeds of sale.

That as such purpose and intent was not conceived in or based upon any *fraud* in fact, it should be enforced unless to do so would violate some principle of law.

That no principle of law is violated and that the title to the goods received by the Woolen Company from the Niagara Company, and to recover which this suit is brought, was at all times vested in the Woolen Company.

That the Niagara Company was a separate entity with which the Woolen Company contracted and to which it delivered the goods; and that in taking back such goods from the Niagara it exercised rights which did not in any way affect the creditors of Horowitz & Son.

POINT I.

The merchandise in question was delivered to the Niagara Company merely on consignment. The title thereto never passed out of the Woolen Company.

The Construction of the Agreement.

Judge Hough found at page 210:

> "There is nothing in the oral evidence to persuade me that down to about May, 1904, there was any departure either from the letter or the spirit of the written agreements first above set forth."

The departure, after May, 1904, was the theft of certain checks by the Horowitzes without the knowledge of the Woolen Company (p. 219; see also Defendants' Exhibit Y, pp. 179–203).

We can best judge of the transaction by examining the agreement itself. It is, in fact, necessary to construe it and determine its meaning before we can intelligently discuss, whether or not the transaction had the elements of a sale or a factorage agreement.

The agreement (pp. 12–14) was entered into on November 25th, 1902. Under it the Woolen Company agreed to deliver to the Niagara Company from time to time such merchandise as it, in its judgment, saw fit, and the Niagara Company agreed to accept possession of such merchandise upon the following terms:

1. The Niagara Company was to hold and care for same as the property of the Woolen Company, it being expressly understood and agreed that the title to the said merchandise and its proceeds should always be vested in the Woolen Company, that

such merchandise should at all times be subject to and under the direction and control of the Woolen Company, and that title thereto should pass directly from the Woolen Company to the person or persons to whom the same were sold, in the manner and upon the terms contained in said agreement; the Niagara Company agreed to keep the merchandise insured for the benefit of the Woolen Company; the Niarara Company further agreed to sell such merchandise to such persons as it should judge to be of good credit and business standing, and to collect, for and in behalf of the Woolen Company, all bills and accounts for the merchandise so sold, and to pay over immediately any amount so collected, minus the difference between the price at which the merchandise so collected for was invoiced to the Niagara Company, and the price at which it had been sold by the company. The Niagara Company guaranteed the payment of all bills and accounts for merchandise, possession of which was delivered to it under the said agreement, and further agreed, in case any merchandise delivered under the provisions of the said agreement by the Woolen Company to the Niagara Company should not be accounted for in accordance with the provisions of clause IV of the agreement, to pay the Woolen Company the invoice price of such merchandise, and, thereupon, title to said merchandise or to the proceeds thereof, so paid, should pass to the Niagara Company, and be exempted from the provisions of said agreement. It was further provided, that the invoices, given by the Woolen Company to the Niagara Company, were subject to the usual trade discounts of the Woolen Company.

This clause is explained by the supplemental agreement which will be discussed hereinafter.

The agreement was to continue for one year. If for any reason it should terminate, all merchandise, possession of which was held by the Niagara Company under the agreement, was, immediately upon

the termination of the agreement, to be returned to the possession of the Woolen Company.

In November, 1903, said agreement was modified and, as modified, renewed for a year (pp. 18–20). Under the modification, the Niagara Company was to render the Woolen Company monthly accounts of the sales made by it under the agreement, and it was further understood that all prices referred to in paragraph IV of the first agreement should be subject to a discount of 8 per cent., if the Niagara Company turned the amount of the invoices over to the Woolen Company within sixty days from the sale, by the Niagara Company, of the merchandise covered by such invoices, and such invoice prices were subject in that event to a further discount of 2 per cent. after the 8 per cent. discount had been deducted. It was further provided, that on the invoices, the amount of which was not turned over to the Woolen Company within thirty days from the sale of the merchandise, covered by said invoices, the Niagara Company agreed to pay interest at the rate of 6 per cent. after the expiration of sixty days from the sale of said merchandise by the Niagara Company.

It is clear from a reading of the said agreements, that the *Woolen Company never intended to permit the title to this merchandise to pass from it to the Niagara Company or to any one, except a bona fide purchaser of the merchandise from the Niagara Company*, in which event, the title was to pass directly from the Woolen Company to such purchaser, and the Niagara Company became the agent or factor of the Woolen Company to collect for and in its behalf all bills of accounts for the merchandise so sold and immediately to pay over to the Woolen Company the amount collected.

The Niagara Company was never liable to pay for merchandise, which it did not sell, as the so-called terms of credit only dated from the *time of sale by the Niagara Company* and as at the end of the year the Woolen Company had to take back all unsold

merchandise. The eighth paragraph of the agreement contained a clear provision that if for any reason the agreement should terminate, all merchandise, possession of which was held by the Niagara Company under the agreement, should be immediately returned to the possession of the Woolen Company.

The learned Judge who tried this cause, in his opinion (p. 206), made a comment upon and gave his construction to the Fifth paragraph of the agreement. He said:

> "It is to be observed that this document requires the Niagara Company to pay the invoice price of the merchandise delivered to it unless it accounts for the same 'under the provisions of Clause 4', but Clause 4 contains, as above set forth, a specific agreement on the part of the Niagara Company to sell the merchandise and pay over to the Woolen Company the sale price thereof, less the difference between such price and the invoice value. It follows that if the Niagara Company could account to the Woolen Company for money by selling the goods, it was nevertheless bound to pay the invoice price and (continues the written agreement) 'thereupon title to said merchandise * * * so paid for shall pass to' the Woolen Company." (This is a clerical mistake of the Judge. He meant "shall pass to the Niagara Company".)

At page 212 the learned Judge further construed the agreement by stating that

> "It is apparent, that in substance and effect, Horowitz & Son were obliged to pay the invoice price for every yard of goods delivered to the Niagara Company, sooner or later, whether the merchandise was sold or not, and even if it were burned or stolen, the Woolen Company was entitled to sue both father and son for such invoice price, or any deficiency thereof."

Upon this construction of the agreement chiefly the learned Judge bases his decision that the trans-

action was a sale and not a consignment. The appellant, in his brief, follows the same reasoning and attempts to justify the opinion of the learned Trial Judge and to show that the majority of the Circuit Court of Appeals were in error when they differed with the Trial Judge upon the construction of the agreement.

By the first portion of paragraph 5 of the agreement the Niagara Company guaranteed payment of all bills and accounts for merchandise, the possession of which is delivered to it under the agreement. Inasmuch as the words "bills and accounts" occur in the preceding paragraph (number 4) of the agreement and nowhere else in the agreement, this guaranty relates to bills and accounts for merchandise sold by the Niagara Company to its customers.

By the subsequent language of paragraph 5, the Niagara Company agreed that if any merchandise were not "accounted for" to the Woolen Company under the provisions of Clause 4, it would pay to the Woolen Company the invoice price of such merchandise, and thereupon title to the said merchandise or the proceeds thereof should pass to the Niagara Company and be exempted from the provisions of the agreement. The only accounting which was called for by Clause 4 was that the Niagara Company should collect, on behalf of the Woolen Company, all bills and accounts for merchandise sold and immediately pay the same over to the Woolen Company. In case it did not account in this manner, then title to the merchandise, as well as to the proceeds, was to pass to the Niagara Company upon payment of the invoice price of such merchandise; that is, the Niagara Company, on making good its default, became vested with all the rights of the Woolen Company in and to such goods or their proceeds.

The only reasonable construction that can be given to this clause is that, the only accounting called for thereby, was as to the proceeds of goods

sold. Goods, on hand, were accounted for by that fact, itself.

This was a condition precedent to acquiring title.

The construction, given to this clause by the learned Trial Judge, that the Niagara Company, if it did not account to the Woolen Company by selling the goods, was nevertheless bound to pay the invoice price, that is, must account by showing it had sold the goods, is not only a most unnatural construction but is inconsistent with the remainder of the agreement.

Paragraph 8 provides:

> "If for any reason this agreement terminates, all of the merchandise, possession of which is held by the party of the second part" (the Niagara Company) "under this agreement, shall, at the termination, be immediately returned to the possession of the party of the first part" (the Woolen Company.

This eighth clause is inconsistent with the idea that, under Clause V, the Niagara Company was obligated to pay for all merchandise delivered to it and that the transaction was a sale. It clearly shows that the Woolen Company never lost title to the merchandise delivered by it to the Niagara Company, except upon a sale by the Niagara Company to *bona fide* purchasers, in that all merchandise not sold and in the possession of the Niagara Company at the termination of the agreement, must be immediately returned to the Woolen Company. Under this clause of the agreement, the Niagara Company was not compelled to pay over or buy the goods remaining unsold at the termination of the agreement, but it was under an obligation, in accordance with the letter and spirit of the agreement, to return them to the Woolen Company.

Furthermore, it is clear from the modification of the agreement made in November, 1903, that the discounts were computed from the time the Niagara Company sold the merchandise delivered to it by the Woolen Company. Clearly, this is inconsistent

with the idea that, under the agreement, the Niagara Company could at any time be compelled to pay the invoice price of merchandise unsold. This provision of the agreement is meaningless, if the Niagara Company could be compelled to pay for goods delivered to it by the Woolen Company before it had sold them, and before the time began to run within which it could obtain the discount.

If the construction placed upon Clause 5 of the agreement by the learned Trial Judge is correct, then as Clause 1 of the agreement compelled the Niagara Company to accept any goods which the Woolen Company should in its judgment see fit to deliver to it, it would have been possible for the Woolen Company, at any period of the year, to have delivered goods in any amount to the Niagara Company, whether it wanted such goods or not, and then to have demanded that the Niagara Company account to it. Though the Niagara Company had not sold the goods delivered or even had an opportunity to sell the same, under Judge Hough's construction, the Woolen Company could have then demanded that the Niagara Company at once pay the invoice price of such merchandise.

For example, if the appellant's contention is sound, a month after the agreement had been entered into, the Woolen Company could have delivered to the Niagara Company, although the Niagara Company did not request it to do so, a million dollars worth of merchandise. Immediately thereafter it could have called upon the Niagara Company to account and demanded payment of the invoice price of the merchandise so delivered, even though the Niagara Company had not sold or had any opportunity to sell said merchandise. Obviously this is not what the parties intended. No Court would have permitted the Woolen Company to recover under the agreement either from the Niagara Company or the Horowitzes the invoice price of goods so delivered and unsold.

The appellant in his brief seeks to fortify his

argument, as to the manner in which Clause V of the agreement should be construed, by stating that the manner in which the parties transacted their business under the agreement indicates the correctness of his position.

We agree with the appellant that, if a contract is ambiguous, the court in construing it should consider the circumstances attending its execution and the manner in which it is performed by the parties. We respectfully submit, however, that as above shown the agreement is not ambiguous; that it is clear upon its face; that it should be construed as above contended; and that any other construction is forced, strained and unreasonable. We further contend that there is nothing, either in the circumstances attending its execution or in the manner of the performance, which in any way sustains the appellant's position.

Point II of Appellant's Brief Answered.

The appellant, in Point II of his brief, states the grounds upon which he claims that the transaction was one of sale and not a consignment or factorage agreement. He enumerates seven alleged elements of the transaction which he contends support his position.

Before answering these contentions, however, we again call the Court's attention to the fact that the learned Trial Justice, who awarded judgment in the appellant's favor, found that the agreement was honestly lived up to, and based his conclusion that the transaction was a sale rather than a consignment, upon the construction given by him to the agreement, to wit, that the Horowitzes had to take and pay for every yard of goods delivered to the Niagara Company by the Woolen Company. He stated that consignment agreements might take various different forms. The only element in this case, which he considered inconsistent with the con-

signment, was the fact that under his construction of the agreement the Horowitzes, acting through the Niagara Company, were bound to pay for all goods, whether they were sold or not (p. 213).

1. There is nothing in the manner in which the goods, delivered to the Niagara Company, were selected or the prices fixed, to indicate the contract was one of sale and not a consignment agreement.

Under the agreement the Woolen Company, it is true, had the right to ship to the Niagara whatever goods it pleased. There was nothing in the agreement to prevent the Woolen Company, if it so desired, from permitting the Niagara Company from indicating what goods it preferred to have consigned to it. To ship it such goods, and such goods only, was not a departure from the agreement and was not inconsistent with a consignment.

Naturally it was to the advantage of the parties for the Niagara Company to select what goods were to be consigned to it. It was to the advantage of the Woolen Company, because Philip Horowitz was in a better position to judge what goods were saleable. The Woolen Company only desired to ship such goods to the Niagara Company as it was likely to sell. It did not wish its goods left around unsold. It was to the advantage of the Niagara Company, as the factor of the Woolen Company, as the Niagara Company only made a profit when it sold the goods as factor. Under the agreement, its compensation for selling such goods was the difference between the price at which it sold the same and the price at which the goods were invoiced. For this reason it was also interested in having the goods invoiced to it at as low a price as possible. There was nothing in the manner of ordering the goods which in any way indicates that the transaction was a sale rather than a consignment.

2. The Woolen Company was obligated to take back unsold goods.

The appellant contends that the Niagara Company could not return any goods which had once been ordered. This, however, is not the case. As above shown, under the agreement, the Niagara Company was only obligated to pay for such goods as it sold. The eighth clause of the agreement specifically provided that, upon the termination of the agreement, the Woolen Company should take back all unsold goods.

The agreement was for one year Therefore, at the end of the year, the factor could return whatever goods were unsold. It was immaterial whether or not he could return them before this time. There is nothing in the contract to indicate to the contrary. Appellant, however, refers to a letter written by Clifford Woodhull, an agent of the Woolen Company, in December, 1903, in which he stated: "We cannot at this late date consent to have thrown back in our stock fall goods which were made expressly for you and delivered in accordance with the terms of the agreement." This letter was written, in reference to a request to take back goods prior to the termination of the contract. It was at the most an attempt on the part of an agent of the Woolen Company to force the Niagara Company to keep and endeavor to sell the goods in question. It cannot outweigh the positive intention of the parties as expressed in their written agreement and by their course of conduct, which was in accordance with the terms of the contract. It was but a single instance extending over a long period of time, and there is no proof in the record as to what, if anything, happened as a result of this letter. For aught that appears, the goods were taken back. If they were unsold at the end of the year, clearly under the contract the Woolen Company had to take them back. Mr. Woodhull's opinions on the subject could not alter the written contract. Nor

was it inconsistent for the Woolen Company to endeavor to make its agent keep the goods it had selected to sell as consignee and make further efforts to dispose of them. As to inconsistent letters written after the making of an agreement see *Smith* vs. *Nixon Co.*, 149 Fed., 111.

3. There is no merit to the appellant's third contention.

Certain goods were apparently held in storage by the Woolen Company for the benefit of the Niagara Company, so that it could have them delivered to it to sell under the consignment agreement when it so desired. In other words, instead of shipping to the place of business of the Niagara Company a lot of goods which the Niagara Company did not have room for and was not ready to sell, the Woolen Company held these goods in storage. They were charged on the books of the Niagara Company. Apparently, all this meant was, that they were subject to the call of the Niagara Company. The fact that they were charged did not mean that the Niagara Company was obliged to pay the Woolen Company therefor. Its only obligation was, when it received the goods from storage and sold them, to pay over to the Woolen Company the proceeds of such sale. There is nothing in this inconsistent with such consignment.

The cases cited by the appellant to sustain his contention do not apply.

A reading of *Ommen* v. *Talcott* (188 Fed., 401), rather sustains the appellees' position. In that case the bankrupt was the owner of the goods and the defendant Talcott claimed a claim as factor upon the goods, although they remained in the bankrupt's possession. The Court said that, as there was no delivery of the goods to the factor, the factor did not have a lien. The goods remained the property of the bankrupt.

To apply that case to the warehouse goods in the

case at bar: the goods in the warehouse remained the property of the Woolen Company.

It does not follow from this that the goods that were delivered in accordance with the agreement did not remain the property of the Woolen Company.

4. There is no duty upon a factor to keep the goods of his principal in a separate part of his store from that where he keeps his other goods.

The only duty upon a factor is that he should keep a separate account of his transactions for the account of his principal, and know when he delivers goods, whether the transaction is for his own account or for his principal's account and whether the goods are his own goods or his principal's goods.

Here of course the only goods handled by the Niagara Company were the goods on consignment from the Woolen Company. Disregarding the Niagara Company and considering the transaction as being with the Horowitzes, it is clear that a separate account was kept of the Woolen Company's goods, separate books were kept for the Niagara Company, and all the Woolen Company's goods were billed in their name and the proceeds put in a separate account.

5. The fifth contention of the appellant is answered by the contract itself.

The fourth paragraph of the agreement provided that the Niagara Company "agreed to collect for and on behalf of the party of the first part" (the Woolen Company) "all bills and accounts for merchandise so sold, and to immediately pay over to the party of the first part any amount collected as aforesaid immediately upon its collection, minus, however, the difference between the price at which the said merchandise so collected had been invoiced to the party of the second part and the price at

which said merchandise has been sold by the party of the second part" (the Niagara Company).

This part of the agreement, as found by the learned Judge, was lived up to until the Horowitzes began to steal checks without the knowledge of the Woolen Company.

The fact that the Niagara Company had to pay for goods, the proceeds of which it did not account for, does not change the transaction, but was merely a statement of what the law would require.

6. The other business methods of the parties were not inconsistent with the consignment.

The appellant seeks to draw comfort from the fact that in 1901 and long prior to the organization of the Niagara Company and the entry into the contract in question with it, Philip Horowitz & Son bought merchandise outright from the American Woolen Company, and cites *In re Wells*, 140 Fed., 752. That case is not in point, as in that case the Court merely held that the fact that the bankrupt had formerly purchased goods outright was an element to be taken into consideration in judgment of the new arrangement, which was clearly not a consignment arrangement. The decision was by the District Court for the District of Pennsylvania.

The case at bar is entirely different, in that, at the time the arrangement was entered into with the Niagara Company, the bankrupts were not buying goods outright from the Woolen Company, but were receiving goods under a consignment arrangement. When the witness Horowitz testified that Mr. Murphy said the business of the Niagara Company was to be done in the same way, he referred to the old consignment arrangement.

The Trial Judge seems to recognize (pp. 24 and 25) that the 1901 agreement was a consignment agreement, and the majority of the Circuit Court of Appeals held that the arrangement was valid.

Furthermore, in the case of *Matter of Flanders*,

134 Fed., 560, which was decided by the Circuit Court of Appeals for the Seventh Circuit, Judge Jenkins, writing the opinion of said Court, at page 562, said:

> "The fact that Flanders for some years prior to this consignment had purchased goods of the bailee does not avail to prove such contention" (The contension being that the transaction was a sale and not a consignment.)

The fact that subsequently the words "sales" and "salesmen" appeared on the various documents does not change the transaction. Business men are careless in the use of term.

The case *In re Smith & Nixon Piano Co.*, 149 Fed., 141, is in point. In this case the transaction was held to be a consignment or bailment, and that title remained in the consignor, although invoices had been sent which stated the goods were sold to the consignee and although other letters passed between the parties which might be construed to indicate the transaction was a sale. The attention of the Court is particularly called to the language used by the Circuit Court of Appeals, at page 112, in which the test is made whether there was any obligation on the part of the bankrupt to pay for the goods and whether if he had been sued it would not have been a complete defense to show he was not to pay for the goods until he sold them. The Court says, at the foot of page 111:

> "We started with title in the piano company and unless an intention that it passed it to another can be discovered, it remains where it was with all appurtenant rights."
>
> See also *Dores* v. *The Bank*, 91 U. S., 618, at p. 630.

In the case at bar, however, although the regular printed notices of the Woolen Company were used, which were drawn for the purposes of sale, the Woolen Company was careful to have written upon

each invoice: "These goods are delivered on consignment by the Woolen Company and accepted by the Niagara Company upon the express condition that title thereto shall remain vested in the American Woolen Company until paid for." This statement was inserted to override any other provisions on the invoice which did not apply.

The consignment agreement did not permit the factor to sell for what he pleased. It could not sell for less than the invoice price and it was not required to pay for the goods unless it sold them.

A careful reading of the agreement shows an intention that the Niagara Company could not sell for what it pleased, and in no case was to sell for less than the invoice price. This is evident from the fourth paragraph of the agreement, which provided that it was to pay over the difference between the price at which the merchandise so sold had been invoiced for and the price at which the merchandise was sold by the Niagara Company. It is also apparent from the testimony of Joseph Horowitz, who was most hostile to the Woolen Company. He testified (p. 68): "*I wasn't supposed to sell; I wouldn't sell under cost.*" The fact that he could sell for more than the cost price and keep the difference was not at all inconsistent with the consignment arrangement.

In re Smith & Nixon Piano Co. (*supra*), Circuit Judge Hook, speaking of a sale and a consignment, states (p. 113):

> "The specification of fixed prices is as appropriate to one as to the other. It is not an uncommon feature of contracts of bailment, and it means that the commission of the consignee is such sum as he may obtain for the property above the specified price."
>
> See also *In re Galt*, 120 Fed., 64.

The appellant's contention that the Niagara Company must pay for the goods whether it sold them or not, has already been answered at length.

The Niagara Company only had to account for such goods as it sold, and such goods as it did not sell it could return at the end of the agreement. It was never under any liability to pay for unsold goods which it had on hand.

The appellant's contention that even under the construction placed upon the agreement by the majority of the Circuit Court of Appeals the agreement was one of sale, is without merit. The appellant states that under this construction, if the Niagara Company paid the invoice price, it got title to the goods or to their proceeds, if they had already been sold, and that, therefore, Horowitz had a right to buy the goods absolutely.

Even if Horowitz had the right to buy the goods, we do not think that this would interfere with the agreement being one of consignment. We take issue with the appellant's statement of the transaction. The agreement clearly contemplated that Horowitz should sell the goods and should not buy for himself. The provision as to his paying the invoice price if he did not account for the proceeds and thereupon obtain title to the goods or their proceeds, was practically to guarantee the Woolen Company that if the goods were not accounted for as provided in the agreement the loss should not fall upon the Woolen Company. It does not appear that when the arrangement was entered into with the Niagara Company that it was ever contemplated that the Niagara Company or Horowitz should buy the goods; or that they ever did as a matter of fact buy them.

The cases cited by appellant are not in point. They are so clearly based upon an entirely different state of facts that we shall not distinguish each one.

There is, therefore, no merit to the defense.

POINT II.

Even if the transaction between the Woolen Company and the Niagara Company were not a consignment of the merchandise, nevertheless the Woolen Company retained title to the merchandise until payment was made, and, if the transaction were a sale, it was a conditional sale valid under the laws of the State of New York.

Assuming the learned trial Judge to be correct in his interpretation of Paragraph V of agreement between the Woolen Company and the Niagara Company, the arrangement between the parties was for a conditional sale, the title to the property not to vest in the Niagara Company until the payment of the invoice price. The language of the clause is that, if the Niagara Company does not account for the merchandise delivered under the provisions of the agreement, it will pay to the Woolen Company "the invoice price of said merchandise, *and thereupon title to said merchandise or the proceeds thereof so paid over, shall pass to*" the Niagara Company.

It is perfectly apparent from the written documents offered in evidence and from the testimony of the parties, that the whole purpose and intention of the parties was to keep the title to the merchandise delivered in the Woolen Company. It was not to be divested of title in any way until the merchandise was paid for, except by a legitimate sale made by the Niagara Company, in which case it was to pay over the proceeds to the Woolen Company. If the Trial Judge's conclusion, that the Niagara Company was bound to buy the merchandise, be correct, *then it was only to acquire title, and the*

Woolen Company was only to lose title upon payment of the invoice price. This is clearly a conditional sale, recognized as such by all the authorities in the Courts of the State of New York and not contravened by statute or repugnant to any principle of law.

Empire State Type Founding Co. v. *Hugh J. Grant, Sheriff, &c.*, 114 N. Y., 40.

Adams v. *Roscoe Lumber Co.*, 159 N. Y., 176.

Fennikoh v. *Gunn*, 59 App. Div. (N. Y.), 132.

Dunlap v. *Mercer*, 156 Fed., 545.

Under the statutes of New York State, a contract of conditional sale is valid as against creditors or a trustee in bankruptcy, even though it is not filed. The failure to file only makes a conditional sale void as to subsequent purchasers, pledgees or mortgagees in good faith.

N. Y. Cons. Statutes, Sec. 62 of Personal Property Law.

With reference to this statute and the law in the State of New York, attention is called to the case of *Hewit* v. *Berlin Machine Works*, 194 U. S., 296. In that case, the bankrupt contracted with the Berlin Machine Works for the purchase of certain machines for a certain sum, payment to be made within four months from the date of shipment and title to the property to remain in the Machine Company until fully paid for. The machines were shipped to and received by the bankrupt and put in operation in her planing mill. She signed and delivered to the Machine Company two promissory notes which contained the following clause: "Title and right of possession of the property for which this note is given remains in the Berlin Machine Works until fully paid for." This Court held:

"This sale was a conditional sale and the title did not pass to the vendee because the

> condition was not fulfilled, unless the statutes of New York otherwise provided."

The Court then quoted the New York statute then in force, which provided that such a conditional sale should be void as against subsequent purchasers, pledgees, or mortgagees in good faith, unless the contract was filed.

The contract in the case cited was not filed, but this Court held that the trustee was not a subsequent purchaser, pledgee or mortgagee in good faith, and that omission to file the contract was immaterial.

The present statute, which is Section 62 of the Personal Property Law, is substantially the same as the laws of 1897.

This Court, in said case, quoted with approval from the opinion of the Circuit Court of Appeals in the case of *Re New York Economical Printing Co.*, 49 C. C. A., 133; 110 Fed., 514, as follows:

> "The Bankrupt Act does not vest the trustee with any better right or title to the bankrupt's property than belong to the bankrupt or to his creditors at the time when the trustee's title accrues."

The case of *York Mfg. Co.* v. *Cassell*, 201 U. S., 345, *holds the same doctrine and that the trustee stands simply in the shoes of the bankrupt and takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it and subject to all equities impressed upon it in the hands of the bankrupt.*

In the case cited, certain machinery was sold by the York Manufacturing Company to the bankrupt, and was delivered under a contract containing a stipulation that the title should remain in the York Manufacturing Company until the entire purchase price had been paid. The contract was not filed, as required by the laws of Ohio. The Court held the sale to be a conditional one and that an adjudication in bankruptcy is not equivalent to a judgment or

attachment so as to operate as a lien in favor of the trustee as against the vendor, because of non-compliance with the statute of Ohio, which, if given the construction placed by the highest state court upon a similar provision respecting chattel mortgages, renders the unfiled contract of conditional sale void only as to creditors who have fastened upon the property by some specified lien.

In *Bierce* v. *Hutchings*, 205 U. S., 340, the Court held, that a contract for the sale of certain cars, engines, etc., to remain the property of the seller until the payment of the note given for the purchase price, is no less a conditional sale because possession was to be and was delivered, and it may have contemplated that the rails would be put down upon the roadway assumed to belong to the purchaser, or because the contract required additional security in the form of first mortgage bonds of the purchaser

The appellant apparently admits the propositions, that an unrecorded conditional sale is valid in the State of New York and that title, under a conditional sale, remains in the vendor as against the trustee in bankruptcy. He attacks the transaction herein by attempting to show that the vendee herein was allowed to deal with the merchandise, which was the subject of the sale, in a manner inconsistent with the continued ownership of the vendor.

We do not dispute the general proposition that any conditional sale or chattel mortgage is void as to creditors, if it permits the debtor to sell the goods and use the proceeds for his own benefit. We do not think the appellant correctly interprets the New York decisions upon this subject.

The courts of this State, as above shown, recognize that there is nothing invalid in the separation of ownership of title and possession. They also recognize that it is lawful and valid for the vendor to permit the vendee to sell the property, provided he is not permitted to use up or consume the proceeds, but is obligated to turn them over to the

vendor so that they can be applied in payment of the debt.

Conkling vs. *Shelley*, 28 N. Y., 360.
Brackett vs. *Harvey*, 91 N. Y., 214.

The entire distinction between the cases where the conditional sales and chattel mortgages are held valid and where they are invalid, is based upon this question as to whether the vendee, who sells the goods, can consume the proceeds by using them for his own benefit, or whether he must turn them over to the vendor. In the cases cited by appellant and by the learned Trial Judge, in his opinion, this rule is expressly recognized.

In *Brackett* v. *Harvey*, 91 N. Y., 214, the Court, at page 220, expressly recognizes the principle contended for, and says:

> "If the mortgagor sells and actually pays over the whole proceeds, nobody is harmed, for that has only happened which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds have not been paid over, the adverse lien is still unharmed, for, as against it, such proceeds are deemed paid over and applied in reduction of the mortgage debt, although between mortgagor and mortgagee the debt remains and is still unpaid." (Referring to a case where the mortgage provides that the proceeds of sales were to be turned over to the mortgagee.)

The New York Court of Appeals, in this case, cites the case of *Robinson* v. *Elliott*, in this Court, 22 Wallace, 524, and says that the effect given to the stipulation under discussion has received the approval of this Court in a case where the whole subject was deemed open.

In the case cited, the mortgage also contained a provision that the mortgagor might sell on credit, taking good business paper, which the mortgagee was to accept and apply on the debt, and the Court held (at p. 222), that, even this provision could not

be said to affect injuriously the rights of other creditors.

Conkling v. *Shelley*, 28 N. Y., 360, held, that a mortgage containing a clause permitting the mortgagor to dispose of the mortgaged property in his discretion and to apply the proceeds to his own benefit, is void. It distinguishes such a provision from one where the mortgagor might sell, not for his own benefit, but for the mortgagee's, accounting to him and applying the proceeds of sales to the satisfaction of the debt, which the mortgage was given to secure, and holds that in such case the mortgagor becomes the agent of the mortgagee and whatever is received in payment for the goods sold is a satisfaction of the mortgage debt *pro tanto*, whether paid or not.

Edgell v. *Hart*, 9 N. Y., 213, simply held that a mortgage which permitted the mortgagor to sell the mortgaged property and receive the proceeds to his own use was void as a matter of law.

In *Russell* v. *Winne*, 37 N. Y., 591, dealing with the question as to whether a mortgage was valid under which the mortgagor was constantly selling portions of the property as his own, for his own benefit, with the knowledge and assent of the mortgagee, and the Court held that it was void as against creditors. It was not necessary to discuss the other well settled question, that if the mortgagor had turned over the proceeds of the sales to the mortgagee, such an arrangement would have been valid, as the question did not arise in the case.

In re Howland, 109 Fed., 869, was a case where merchandise was sold, with the expectation and for the purpose of retailing it over the vendee's counter, and it has been universally held that such a state of facts is inconsistent with the retention of title in the vendor, because the proceeds of sales could not be and were not paid over to him.

In *Matter of Penny & Anderson*, 176 Fed., 141, cited by the learned Trial Judge and by the appellant, the debtors were permitted to sell and dispose

of the goods, which were wines and liquors, in the ordinary course of their business as restaurant keepers, which was in itself inconsistent with the idea of a consignment or the retention of title. The agreement was silent as to the disposition of the proceeds of sale, and as a matter of fact, these proceeds were placed in the business and to the credit of the bankrupts.

This case is like the chattel mortgage cases in which a party undertakes to allow another to use property as if it were his own, thus virtually giving up a lien upon the property, but asserting one when the mortgagor gets into difficulties with his creditors.

As stated in *Robinson* vs. *Elliott*, 22 Wallace, 524, the arrangement in the Penny & Anderson case was one which made it merely a shield to the debtor, and without any force as a security to the holder.

In the Penny & Anderson case the bankrupts were allowed to use the proceeds of sale as their own, and the agreement therein recognized an indebtedness on the part of Penny & Anderson, and there was no agreement that the proceeds of sale were to be kept in a separate fund, and as a matter of fact, they were not so kept. The facts are entirely inconsistent with the continuance of title in the vendor, or with the idea either of consignment or a conditional sale, and thus make the arrangement one tending to hinder, delay or defraud creditors.

In re Garcewich, 115 Fed., 87, was a case where goods were *sold to the bankrupt by the United Shirt & Collar Co., upon credit*, on the understanding that the title to such of them as should not be sold to the bankrupt should remain in the vendor until payment of the purchase price.

While the Court held that it was the settled law of the State that personal property might be sold and delivered under an agreement for the payment of the price at a future day, and the title, by ex-

press agreement, remained in the vendor until payment of the purchase price, it further held that the payment of the purchase price in the case quoted was not made conditional upon the vesting of title, but the goods were actually sold to the bankrupt, and a secret agreement was made by which the title to such of them as were not sold by the bankrupt was to remain in the vendor.

The facts, in the case last cited, clearly show legal fraud, because the title to the property was vested in the bankrupts, but in case they should not sell any, then the title to the goods unsold was to remain in the vendor, which meant that it was practically to revert to or revest in the vendor. Having the title to the goods, the bankrupts had the right to use the proceeds of sale. This was another of that class of cases in which it is held to be a legal or constructive fraud to have some secret arrangement by which title shall be passed from the vendor to the vendee, thus giving to and clothing the vendee with the absolute right to dispose of the goods *and keep the proceeds*, and then in case creditors shall assert their claims to the goods in question, to have a secret agreement with the vendor, by which the title is to revert or pass to him.

In re Wells, 140 Fed Rep., 752, the facts were also entirely different from those in the case at Bar. The bankrupt had handled silk threads of the claimant for a number of years. In September, 1904, however, having fallen behind in her payments and becoming considerably indebted to them, it was arranged *that thereafter the goods should be consigned to her*, instead of being sold to her in the regular way. It was further provided that she should take an inventory of those which she had on hand, which were to be thereupon credited on her general indebtedness and charged to her on her consigned account, and thereafter be held in that way. With respect to these and those which were subsequently received,

she was to report monthly the amount she had on hand and the sales which she had made, paying for the latter the regular wholesale price at which the goods were billed to her.

It was urged by the Silk Company that this money received from sales should be kept separate, but this Mrs. Wells declined to accede to, as being impracticable.

The question in the case was: whether Mrs. Wells was merely acting as the factor or agent of the Silk Company in disposing of the goods, or whether in making sales she acted for and on her own account, realizing what she could, and being answerable to them only for the wholesale price.

The Court properly held that as to the goods which she had on hand September 8, 1904, at the time of the supposed change in her relation to the Silk Company, there could be no such shifting over from one account to the other, as was attempted. And the Court properly said (p. 754):

> "She had numerous creditors, whose debts are still unpaid, and the title to the property which she had could not be made a mere matter of bookkeeping in this way."

The Court laid stress upon the fact that the goods were sold by her on her own account, at such figures, and to such parties as she saw fit, but were charged to her by the Silk Company at definite prices. That the money was not to be kept separate, and that the only purpose of the provision that she should make monthly reports was apparently in order to keep track of her sales.

In this case (as in the others above quoted under this point), the bankrupt had the right to use the moneys received from sales. She expressly declined to keep the sales receipts separate from her other moneys.

The learned trial Judge also cites the case of *Skilton* v. *Codington*, 185 N. Y., 80, as an authority in favor of his decision, that while the intention of the parties was to retain title in the American

Woolen Company, yet the transaction was fraudulent as a matter of law. The appellant places much reliance on this case. The question therein was whether the chattel mortgage which gave permission to the mortgagor to sell mortgaged chattels and apply the proceeds to the payment of the debt, *excepting such portion thereof as is necessary for the expenses of the business, or as he may need to replenish or increase the stock of goods*, was fraudulent as a matter of law against creditors.

The Court held the mortgage void, but also expressly held that permission given the mortgagor to sell the mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, did not render the mortgage void (p. 90).

The reason of this decision is given in the opinion, and is contained on the last page at the close of the opinion, page 92:

> "The purpose and intent of the agreement between the parties is plain on its face. The mortgagor was to conduct the business for the term of five years in the same manner as if he was the absolute owner of the stock in trade, selling and buying stock at his pleasure and discretion and paying the expenses of the business out of the sales, while if at any time he should be unsuccessful and be pressed by his creditors, the whole stock was to be subject to the lien of the mortgage as against the creditors from whom the very goods might have been purchased."

The mortgagee, therefore, practically had no lien upon the property, *because he allowed the mortgagor to sell it and use the proceeds as his own*, but in case creditors asserted any claims against the mortgagor, then he was to assert his title under the mortgage to the property remaining. This was certainly a legal fraud upon the creditors.

In the case of *Pontiac Buggy Co.* v. *Skinner*, 158 Fed., 858, the Court, at page 862, recognizes the distinction between the cases cited and the case at

bar and cites a number of cases, including the Garcewich case and the Carpenter case, 125 Fed., 831. In referring to the latter cases it says (p. 862):

> "*In re Carpenter*, 125 Fed. Rep., 831, 833, this Court followed *In re Garcewich, supra*, in a case where the order for goods was quite similar to the one under consideration here, and pointed out the distinction sharply drawn between that line of cases where the title of property sold is to pass when paid for only, and in the meantime the property is to be retained and used by the vendee, or, if sold, the proceeds are to take or stand in its place and be passed over to the vendor in payment or as his own, and that other line of cases where the sale is in terms conditional—that is, it is provided that the title shall remain in the vendor until the property is paid for, *but, still, the vendee is given full power to use up, consume, or sell and give good title and take or hold the proceeds as his own.*" (Citing a number of cases.) (Italics ours.)

Further on in the opinion, at page 867, the Court says that

> "if the agreement be that the vendee may sell, and that if he does he shall pay over the proceeds to the vendor to apply on the debt, then there is no fraud, and the vendee has no title."

In *Re Marine Construction and Dry Dock Co.*, 144 Fed., 649, Judge Lacombe, writing the opinion for the Circuit Court of Appeals for the Second Circuit, clearly states the law of New York State, at page 651:

> "It is abundantly settled by authority, as petitioner contends, that (all requirements as to filing, recording, etc., being complied with) a mortgagee of materials may agree with the mortgagor that the latter may remain in possession of the goods and may sell them, from time to time, provided that the proceeds of all thus sold are applied either to payment on the mortgage, or to reducing some prior lien,

or to the purchase of additional property, of not inferior value, to take the place of what is sold."

See, also:

Smith vs. *Williams*, 90 App. Div. (N. Y.), 507.
Dunlap vs. *Mercer*, 156 Fed., 545.
In re Hartman, 185 Fed., 196.
In re Perlhefter, 177 Fed., 299.

Applying the rules laid down by the foregoing decisions to the facts in the case at bar, we respectfully submit that the Woolen Company had a perfect right to take back the goods in question, inasmuch as the title thereto was in it.

The written agreement between the parties, if it established anything, established the fact that it was the intention of the parties that the title to the merchandise, or the proceeds thereof, should never pass out of the Woolen Company until payment had been made therefor, unless the goods were sold by the Niagara Woolen Company to *bona fide* purchasers, in which case the Niagara Company was the agent of the Woolen Company, to collect for it and pay the proceeds over.

There is absolutely nothing in the agreement, which would indicate for a moment, that the Niagara Company or the Horowitzes were ever to be entitled to deal with the goods as their own, or to exercise any acts of ownership until they had paid for the goods. In fact, the entire arrangement, as shown by the organization of the Niagara Company, was to prevent the Horowitzes from ever getting title to the merchandise in question, unless it was paid for, and to assure the Woolen Company that it would either have the title to the merchandise or receive the proceeds upon its sale. Every precaution was taken to prevent the bankrupts from using the proceeds of sales in their business.

The intention of the parties could not be more clearly expressed than in the case at bar, and the

court is now asked to disregard that intention, and hold that the parties did not intend nor did their acts and writings declare this to be so. This the court will not do, unless it finds that the whole arrangement was not *bona fide*, and was a cover for some fraudulent scheme entered into between the parties. The finding of the learned trial Judge negatives any such idea, and on the contrary, establishes the fact that the arrangements entered into between the parties were *bona fide*, and that they were carried out according to the letter and spirit of the agreement until May, 1904, when Philip Horowitz, the President of the Company, began to steal the proceeds of sale (p. 211).

The appellant's argument is an attempt to overcome the force of the decisions hereinbefore cited, by an endeavor to find something in the acts of the parties, which would not only show that the agreement entered into between them was not the real agreement, but which would be in direct opposition to the finding of fact of the learned trial Judge. He alludes to the fact, that, when the goods were sold, the proceeds were not paid over directly to the Woolen Company, but instead they went temporarily into the Niagara bank account.

If we treat the Niagara Company as the Judge did, as being virtually the American Woolen Company (p. 214), then the proceeds went, where they were intended to go under the agreement. If, as appellant seeks to argue, the Niagara Company represented the Horwoitzes, then the proceeds of sale, being paid to the Niagara Company, were no longer subject to the disposition of the Horowitzes, because they could not be withdrawn from the Niagara Company without the concurrent assent and signature of the Treasurer of the Niagara Company, who was in the employ and under the control of the Woolen Company (pp. 41, 157).

The arrangement, whatever it was, absolutely secured the one important thing for the protection of the Woolen Company—that the proceeds of sale

could not be used by the Horowitzes, or the Niagara Company, as their own, without either or both of them committing a crime. All the proceeds of merchandise, title to which vested in the Woolen Company, were paid over, as received, to the Niagara Company, and inasmuch as this company had no dealings with any other person or corporation except the Woolen Company, all the moneys in its bank account were held by it for the Woolen Company. The fact that these moneys were not paid over by the Niagara Company to the Woolen Company instantly as and when received, but were paid over from time to time, makes no difference, because eventually they were all paid over to the Woolen Company, as agreed.

Attention is called, in this connection, to the testimony of Joseph Horowitz, on pages 76 and 77 of the record, the substance of which is as follows: Sooner or later all the money that was realized by the sale of goods that came from the Woolen Company went into the bank account of the Niagara Company. It all went to the Woolen Company, with the exception of a balance of about $1,200, which represented the profits, and which was retained in the Bank by the Niagara Company to pay expenses, when there was a profit.

See also testimony of Joseph Horowitz, page 78, where he states that the reason he did not keep on drawing the $1,200, was that Mr. Dawber, the treasurer, said that the sales did not warrant it.

Horowitz further states (p. 77) that Mr. Dawber (the treasurer) came in every day, and whatever money came in that day the deposit was made and Mr. Dawber and he signed checks, and they made out a check and it went to Boston, and Mr. Dawber took it over. (The American Woolen Company's financial office was in Boston.)

That this $1,200 a month was paid out of profits, so long as it was paid, is found by the learned Trial Justice in his opinion at page 209, where he says: "No dividends were paid on the Niagara Company

stock, nor are any earnings of that Company shown in excess of $1,200., while in the early summer of 1904 these payments were stopped because in the opinion of the Secretary and Treasurer the 'earnings did not warrant' them."

That the Woolen Company could keep track easily of the earnings of the Niagara Company is evident from the fact that the earnings were the difference between the price at which the goods were invoiced and the price at which they were sold, and the books were in charge of the Woolen Company's bookkeeper, who, of course, knew and recorded the invoices and sales prices, and received the proceeds of sale, entering them upon his books (pp. 117-122)

In addition to this, the Niagara Company rendered to the Woolen Company monthly reports of the sales, and Mr. Dawber, the treasurer of the Niagara Company, called daily and kept track of all receipts (pp. 120, 101).

If, as the appellant contends, there was nothing to prevent the Horowitzes from selling, and not reporting the sales, that would not alter the rights of the parties under the agreement.

Conkling vs. *Shelley*, 28 N. Y., 360, 364.

The criticism of appellant's counsel of the majority opinion of the Circuit Court of Appeals, wherein it was stated that the agreements in question were contracts containing elaborate provisions to prevent the consignee from procuring the goods and selling them and applying the proceeds to their own use, is not justified, and we accept the challenge of appellant's counsel, on page 75 of his brief, to show these elaborate provisions.

Briefly stated, and as heretofore argued, the agreement in question contained a provision that the title to the goods in question should remain at all times in the Woolen Company, and should pass directly from it to the persons to whom they were sold by the Niagara Company, and that the proceeds of sale

should be collected by the Niagara Company as the agent of the Woolen Company, and immediately paid over to it.

It further contained a provision that all goods remaining unsold at the expiration of the contract, and remaining in the possession of the Niagara Company, should at such termination be immediately returned to the possession of the Woolen Company, and although the agreement contemplated a case in which the Niagara Company might fail to account, as its agent, as provided in paragraph 4 of the agreement, it further expressly provided that title to the merchandise should only pass to the Niagara Company upon payment of the invoice price. The formation of the Niagara Company itself, and the whole plan devised for the protection of the Woolen Company, is strong evidence of an intention and purpose on the part of the Woolen Company, acquiesced in by the Niagara Company and the Horowitzes, to retain the title to the merchandise and to the proceeds thereof, and to prevent the dissipation of the goods or their proceeds.

In addition to these provisions contained in the agreement, which we think are elaborate enough to answer the criticism and challenge of appellant's counsel, the Woolen Company further undertook to secure the performance of these conditions by compelling Horowitz to pledge to it, as security for the performance of the contract, all the stock held by him in the Niagara Company.

After the Woolen Company had thus, by a written agreement, which is found by the learned Trial Justice to have been made in good faith, undertaken to secure to itself the title to the merchandise and its proceeds, and to constitute the Niagara Company and its officers its agents for the purpose of collecting the proceeds of sale and turning same over to the Woolen Company, the validity of this arrangement cannot be affected by the fact that Philip Horowitz, the president of the Niagara Com-

parties was a valid one. He apparently misunderstood the force of said decisions. Legal fraud only exists, under these cases, where the party is permitted to use the proceeds of sale as his own, which the Judge found was not done in this case.

The arrangement was not fraudulent in law, in that the Niagara Company had a right to sell the goods, because under the arrangement the proceeds of such sale were to become the property of the Woolen Company.

It was not fraudulent in law, because the Niagara Company was under no obligation to and did not keep the goods separated from the goods belonging to Philip Horowitz. The law does not impose any such duty upon the part of any consignee or vendee upon a conditional sale, and there is no contention in the case at bar that any creditor was misled by any mingling of goods. The allegations of the bill of complaint to this effect were abandoned on the trial. The goods were held by the Niagara Woolen Company as the property of the Woolen Company, and the proceeds of sale turned over to the Woolen Company.

There was nothing fraudulent in the creation of the Niagara Company, whether that company be considered a mere dummy or as an actual entity. Its existence was in no way concealed or secret. Even if it were merely a dummy, the transactions must be tested as if had directly between the Woolen Company and the Horowitzes, and, judged by this test, the transactions would be valid and the title to the goods in question would remain in the Woolen Company.

Whatever name, therefore, be given to the transaction, the intention of the parties was that the title should remain in the Woolen Company, and it must be judged by such intention, unless it be, as above illustrated, either legally or constructively fraudulent, and there is no fact in this case which would warrant the conclusion that the transaction was in any way fraudulent in law. It is difficult

to see how these transactions could possibly have hindered, delayed or defrauded creditors. There is no way that they could be misled. For a year prior the Horowitzes had been known and recognized as the consignees of the Woolen Company. The creation of the Niagara Company was a step further still from giving the Horowitzes even the appearance of ownership. How could any merchant possibly have been misled?

POINT III.

There being no actual fraud, the Court had no right to disregard the legal entity of the Niagara Company and hold that the merchandise in question belonged to Horowitz, and could therefore be recovered by his trustee in bankruptcy.

The Woolen Company intended to consign goods to the Niagara. The Woolen Company intended it obviously, because it would not trust Horowitz. The whole scheme or plan is concededly to safeguard the Woolen Company from the possible future dishonesty of Horowitz. No secret whatever is made by the parties, nor is any arrangement clandestine in its nature entered into. The parties made this arrangement, which is absolutely valid, as the trial Court finds, between themselves. It makes no difference whether it was a sale or consignment, unless the Court can absolutely disregard the Niagara Company which the Court below did. The Niagara Company, it says, was a mere paper corporation; it had no existence practically. The Court seems to overlook the fact that corporations are frequently and legitimately created for the purpose of affirmatively limiting liability. It is an

pany, succeeded in misappropriating some of the proceeds of the sales.

Conkling vs. *Shelley*, 28 N. Y., 360.

The learned Trial Justice, who found in favor of the appellant, placed his opinion upon a different ground. As already pointed out, he construed the agreement to mean that the Horowitzes were bound to pay the invoice price for all merchandise delivered to the Niagara Company under the agreement.

Even assuming this construction to be correct, despite our argument herein heretofore made to the contrary, this Court cannot ignore the express provision in the agreement that the only way in which an absolute sale of the goods could be made and the title pass out of the American Woolen Company was upon payment of the invoice price. See agreement, page 14, which provides that if the Niagara Company does not account to the Woolen Company, as provided in clause 4, that it must pay "the invoice price of said merchandise to the Woolen Company, *and thereupon* title to said merchandise, or the proceeds thereof, so paid for, shall pass to the party of the second part" (the Niagara Company).

The learned Judge in his decision also found, however, that while there was no fraudulent intent and no fraud in fact in the case at bar, the transaction was constructively fraudulent. He does not state, however, just what fact or facts there are in this case to justify this finding that the transaction was fraudulent in law. In fact, it is difficult to tell from his opinion whether or not his conclusion, that title pass out of the Woolen Company to the Horowitzes, is based upon the finding that the transaction was a sale *per se*, rather than upon legal fraud. In parts of his opinion he speaks of legal fraud and cites certain cases thereon. These cases cited by the learned Court have been already referred to in this brief, and we do not think they justify his conclusion, because under said cases the arrangement between the

every day occurrence for men, who wish to limit their personal liability, to convert themselves into a corporation, of which they are the only spirits and the only active factors, and carry on business through the corporation as a mere vehicle, and thus avoid liability for anything more than the capital stock of the company, yet this has never been criticized or condemned, and the very purpose of the law creating corporations was to create just such fictitious entities. And just as the same can be affirmatively done for the purpose of limiting liability, just so it can be negatively done in order to escape needless risk, and to safeguard one's interest. Was it not perfectly legitimate for the Woolen Company to say to Horowitz, "You wish to continue to do business with us; we recognize your ability as a salesman; we are willing to utilize that ability, but we will not trust you; we do not consider you trustworthy; the only way in which we will do business with you is: we will form a corporation; we will trust our goods to that corporation; we will arrange as between you and that corporation that you shall have full selling facilities, and that you shall receive just as much compensation by your activities as you would have received if you were our direct agent."

This is exactly what was done. This is exactly what the trial Court says was perfectly valid between the parties. And yet, forsooth, in so doing, without any proof that anybody has been affected by it, prejudiced by it, or damnified by it, the creditors of Horowitz & Son, because their goods were sometimes mingled by Horowitz with his own, which is a permissible and inevitable feature of every consignment or conditional sale, especially as in the case at bar where the identity was never destroyed, are permitted to claim that this arrangement was fraudulent as to every one of them, and that, as to them and each and every one of them, no matter when, how, or where their debts were contracted, that these goods belonged to Horowitz & Son, and

that the Woolen Company had no right to take or receive them back.

The complainant in this case in framing his bill of complaint asserted *actual fraud*, and also based his right to relief upon an estoppel, claiming that by the mingling of the goods of Horowitz and the Woolen Company's creditors were induced to give credit, and were thereby defrauded.

The trial Judge has found that there was no actual fraud, and that everything that was done was done in good faith. If that be so, then upon what theory can the corporation be set aside? The contract was made with it, the goods were shipped to it, and the fact that the President of the Company, Philip Horowitz, who was to gain by sharing in the dividends on his stock, guaranteed the performance of the agreement by the Niagara Company, is not such a circumstance as would enable the Court to hold that the scheme devised was legally void as against creditors.

The trial Justice says (p. 215): "It results, therefore, that in my opinion the legal effect of the transactions shown in evidence is that at the time defendants removed the goods which are the subject of this suit, such goods had been delivered to Horowitz & Son and were in their possession in pursuance of the contracts of November 25th, 1902, whereof the legal result was to render the persons to whom the goods were delivered and intended to be delivered (*i. e.*, Horowitz & Son) the vendees of the same."

How can it be said, upon the evidence in this case, that these goods were delivered, and intended to be delivered to Horowitz & Son? Every safeguard was taken by the Woolen Company to prevent that very thing. Not only were the goods in fact delivered to the Niagara Company, but under the contracts between the Woolen Company and the Niagara Company, deliveries under sales were to be made direct to the purchasers, and the Niagara Company was to collect the accounts on behalf of

the Woolen Company and pay them over to the Woolen Company. All of this was made for the very purpose of avoiding the giving of possession to Horowitz & Son, and even to prevent the Niagara Company from handling any more goods than was necessary.

There was no actual fraud intended by the parties to the transaction, as the learned Justice found, and if that be so, and if the Woolen Company, which had been consigning goods to Philip Horowitz & Son, prior to the incorporation of the Niagara Woolen Company, desired to protect itself against their subsequent dishonesty, and assure itself that it would always retain title to the goods, thus determined to form this corporation, with Philip Horowitz and Joseph Horowitz, or both of them, as members thereof, why did it not have a perfect right to do so, and consign its goods to the corporation thus formed?

It is true, Philip Horowitz was the largest stockholder in the Company, but his stock was immediately pledged to the Woolen Company as security for the faithful performance of the agreement by the Niagara Company, and all he did was to guarantee the performance of that agreement.

It is true that the Niagara Company was formed for the purpose of dealing with the Woolen Company, but it is evident, from the undisputed facts and agreements, that the Woolen Company wanted to protect its title to the goods which it delivered to the Niagara Company, and one of the Horowitzes was made the president, because he had the means and facilities for selling the goods.

It is not an unusual thing for a factor such as the Niagara Company was, to guarantee sales, nor was it at all strange that the Horowitzes, who owned the greater part of the capital stock of the Niagara Company, and who were to receive therefor the greater part of the profits in the shape of dividends made by the Niagara Company through the sale of its goods, should have

been interested sufficiently to have guaranteed the performance of the contract between the Niagara Woolen Company and the American Woolen Company.

The situation was this: The Niagara Company was formed for the purpose of dealing with the Woolen Company, in order to protect the latter company. The Woolen Company was willing to trust goods to the Niagara Company in such a way as not to be divested of its title. To secure itself still further, it required Philip Horowitz to assign to it all the stock which he had in the Niagara Company, and which was secured by a mortgage given by him to the Niagara Company. This was all honestly done, as the Trial Judge found.

On what theory, then, does the Trial Court brush aside the Niagara Company, which was created for the purpose of dealing with the American Woolen Company, and for its protection, and substitute Horowitz & Son in its place, thus putting them back in the position they were before the Niagara Company was formed.

Unless the complainant in this action had proved the facts alleged in his bill of complaint, that the whole scheme was one entered into between the parties, for the purpose of defrauding creditors, which was not shown on the trial and not found by the learned Trial Judge, then the legal entity of the corporation must be recognized and observed.

It may well be that, if the Woolen Company entered into a scheme with Philip Horowitz to defraud his creditors, and formed the Niagara Company as an intermediary between it and Horowitz, and undertook to deliver goods to it, but really to Philip Horowitz, allowing Philip Horowitz to sell them and pocket the proceeds, and if the creditors of Horowitz & Son sold goods to Philip Horowitz & Son on the faith of his possession of the merchandise so delivered by the Woolen Company, that it would be a fraud upon creditors, and the Woolen Company would be

estopped from claiming its goods as against any person who was thus misled and gave credit to Philip Horowitz & Son.

There is not only no such evidence in the case, but the learned Trial Judge deliberately holds the contrary. In view of all the facts developed at the trial such a charge against the Woolen Company is absurd.

It is important to observe at this point that the bill of complant was not framed upon the theory of an unlawful preference under the Bankrupt Act, but upon a fraudulent scheme entered into to hinder, delay and defraud creditors.

The Trial Judge finds that the delivery of the goods under the agreements and circumstances appearing in the evidence was a sale to Horowitz, because the Niagara Company was only a dummy corporation.

The conclusion of the learned Trial Judge is not justified by the facts appearing in the record. He says (p. 214):

> "There was no real person for the Woolen Company to contract with except the bankrupts, and the whole and avowed meaning and intent of the arrangement was not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them. If the Woolen Company could not have dealt with an independent Niagara Company in the manner it did without having its dealings result in a sale, then that situation is not bettered by the intervention between the Woolen Company and Horowitz of a paper corporation which was merely another name for the Woolen Company itself."

The Niagara Company was a real "person," with whom the Woolen Company had a perfect right to contract. Philip Horowitz held all the stock of this Company, with the exception of two shares, which were held by the clerks of the Woolen Company.

The fact that Jeremiah P. Murphy, the manager

of the Woolen Company, as Trustee, had the right to vote upon the stock as the Woolen Company of New York should direct, except that as long as the conditions of the contract were kept and preserved by the Horowitzes and the Niagara Company, he was to vote for such person as president of the Niagara Company as the Horowitzes might designate, did not make it any the less a real corporation.

Horowitz had a large interest in this corporation, upon which he hoped to realize dividends in the way of profits by the sale of the goods by him through his efforts as president of the Niagara Company. This was perfectly proper, and did not tend to destroy the identity of the corporation. It surely cannot be said that it was another name for the Woolen Company itself, because the principal stockholder was Horowitz, and the Woolen Company only held two shares of the stock.

It is true that Horowitz' stock was pledged to the Woolen Company as collateral security for the performance of the agreement between it and the Niagara, but this again was proper, because the Woolen Company was anxious to have some security for the guaranty which the Horowitzes had given, that the contract between the Niagara Company and the Woolen Company would be observed.

The Niagara Company did carry on its own real and independent business, using the president's (Philip Horowitz) services in selling the goods. It did no other business but selling the goods which were consigned to it by the Woolen Company. The fact that the president of the corporation agreed to pay the expenses of running the Niagara Company does not affect the situation, because in the selection of any factor by the Woolen Company, or the consignment of goods by it to another corporation, it had a right to make arrangements upon such terms as would be most beneficial to it. If a factor, as part of a contract, had agreed with the consignor to pay all the expenses of doing the business, relying on the fact that he

would make enough profit over the amount at which the goods were consigned to him, it certainly could not be held to be illegal or fraudulent, and so it follows that if a corporation became the factor of any principal, it would not be improper or illegal for the principal stockholder in the corporation to agree to pay all the expenses of conducting the business of the corporation.

Two answers can therefore be given to the Trial Judge's conclusion: First, that the Niagara Company was neither a dummy corporation, nor another name for the Woolen Company itself, but was an actual corporation, formed for the very purpose, as has been before set forth, of dealing with and protecting itself against the possible dishonesty of Philip Horowitz. And, secondly, even if it was a dummy corporation, that the Woolen Company had the right to form a corporation which should be a separate entity from Horowitz, and over which it could exercise control, for the purpose of protecting itself, and delivering goods only to that corporation.

The cases which are cited by the appellant on the question of when the entity of corporations will be disregarded, all present a different state of facts and involve an entirely different question.

Holbrook, Cabot & Rollins Corp. vs. *Perkins*, 147 Fed., 166, was a case where a corporation, in order to avoid liability, formed a new corporation, which, one of the officers admitted, was organized for the sole purpose of avoiding attachments, and that it was without capital (see p. 168). To this new corporation the principal corporation sublet a contract which it had for the construction of a dam. The action in question was brought against the principal corporation to recover damages for negligence, and the Court held that individuals were not permitted to form corporations for the sole purpose of avoiding ordinary legal liability (p. 169).

In this case, the ruling of the Circuit Court of Appeals in the case of *United States* vs. *Milwaukee*

Refrigerator Transit Co., 142 Fed., 247, was quoted with approval as follows:

> "If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."

Applying that rule to the Holbrook case, the Court was bound to hold that the sub-corporation was formed merely for the purpose of justifying wrong and protecting fraud.

In the case at Bar, however, the Niagara Company was not formed either to defeat public convenience, justify wrong, protect fraud, or defend crime, but to protect the Woolen Company in the delivery of its goods. It was not seeking to avoid any liability to creditors, and the finding of the Judge below, that there was no actual fraud on the part of any one, in the sense either of suppression of truth or suggestion of falsehood practised on creditors, shows that it was not formed for the purpose of committing any fraud, or enabling any one else to commit it.

In the *Matter of Muncie Pulp Co.*, 139 Fed., 547, the Court merely held that it had jurisdiction to order property of the bankrupt in the possession of a bailee or agent to be delivered to the receiver, pending the appointment of a trustee.

In that case, the receiver or agent was another corporation.

If the Woolen Company had become bankrupt, this case might apply, to the effect that whatever interest it had in the Niagara Company could be turned over to its receiver.

In re Rieger, Kapner & Altmark, 157 Fed., 609, is a similar case to the *Matter of Muncie Pulp Co.* (*supra*), and is distinguishable on the same grounds.

In the case of *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 Fed., 247, the bill showed the creation, by the controlling interests of the brewing companies, of a dummy corporation, with dummy directors, and scienter of its character by the carriers, with intend to evade the law

It was in this case that the Court laid down the general rule which has been cited above and which was approved in the case of *Holbrook* v. *Perkins* (147 Fed , 166).

The case of *Booth* v. *Bunce et al.*, 33 N. Y., 139, cited by counsel for the appellee in the court below, involved the same questions discussed in the foregoing cases under this point, where a corporation was fraudulently created for the purpose of avoiding liability under the law.

In the case of *Werner* v. *Hearst*, 177 N. Y., at page 67, the Court would not allow an inquiry into the corporate entity, where it was shown that the defendant was not the owner of the wagon which caused the accident, but that it was owned by a corporation.

In re Watertown Paper Co., 169 Fed., 252, recognizes that the separate entity of a corporation is not to be disregarded except to circumvent actual fraud.

If no fraud was actually intended by the parties in the formation of the Niagara Company in what respect can the arrangement be said to constitute a legal fraud in the sense that it operated as a fraud upon creditors and the parties must have intended the consequences of their acts?

It cannot be denied that the Woolen Company had the right to form the Niagara—What was its purpose in so doing?—not to hinder, delay or defraud the creditors of Horowitz—but because it did not have faith in Horowitz and wanted to protect itself against him.

If the Woolen Company had without any actual attempt to defraud creditors consigned the goods directly to Horowitz, it would have had the legal right to do so, and even if in law, it had been held that

the effect of the dealing of the parties had been a sale instead of a bailment, no legal fraud could have been inferred.

The most that could have been held would be that the goods belonged to Horowitz, and the only remedy of the Justice would have been an action to recover them back upon the ground that an unlawful foreclosure was made. No such point is involved in the case at bar.

POINT IV.

Even if it be held that the transaction in question was a sale of the merchandise to Philip Horowitz & Son, the bankrupts, the complainant is not entitled to recover, because the bankrupts returned the property to the Woolen Company, the seller, thus paying a lawful debt.

This action is brought to recover back property which the Woolen Company had received, as the bill alleged, pursuant to a scheme entered into to hinder, delay and defraud creditors, which scheme is set forth in full, and asserts the mingling of the bankrupts' goods with the goods of the Woolen Company and that creditors were defrauded by reason thereof. It is not brought under the section which authorizes a trustee to avoid a preferential transfer, and no such question was involved in the trial.

If the transaction was a sale to the bankrupts, then they had a perfect right to return goods in payment of their debt, and the Woolen Company had a perfect right to receive them; and unless an action was brought against the Woolen Company to recover the goods upon the ground of a preference, and proof was submitted sufficient to justify a recovery,

the Woolen Company would not be compelled to return the goods.

If this transaction was a sale, the Woolen Company became a creditor of the bankrupts, and the bankrupts had a right to pay for the amount they owed it, in whole or in part, by returning the goods.

The recent case of

Coder vs. *Arts*, 213 U. S., 223,

shows the difference between an action to recover a preference and an action to recover upon a transaction made with intent and purpose to hinder, delay or defraud creditors.

POINT V.

The complainant's recovery in the District Court was utterly at variance with the allegations of his bill of complaint, and the judgment of said Court was properly reversed.

The gravamen of complainant's action is actual fraud. This has not been proven. There can be no inference of legal fraud, because there are no facts upon which it could be predicated.

It is difficult to determine whether the trial Judge wishes to be understood as holding that the transactions in suit constitute a sale *per se* even as between the parties, or sales only as to creditors. While allusions to legal fraud may be found in his decision, his reasoning is equally applicable to holding that even between the parties the transactions constituted sales. The Judge holds (p. 212): "It (the Woolen Company) was from the moment of delivering goods contractually entitled to recover from Horowitz the sale price

of those goods, and could not be compelled to resume possession of any of them."

And later (p. 212) he says, "I am convinced that the vice of defendants' position is that they have wrongfully *labeled* what they did." And from that point to the close of his opinion, he proceeds to demonstrate that the transactions are not consignments, as they will not stand the tests of consignments, but are *per se* sales and nothing else, and he winds up with that statement that the legal result (p. 215) of the transactions is that the Horowitzes became the vendees of the goods—not alone as to creditors, but from the inherent nature of the transactions themselves.

If this reasoning is correct, the plaintiff's bill fails, and while he may have had other remedies on other theories and upon other and proper proof to have held the Woolen Company responsible for the value of goods taken away by it, he cannot recover therefor in this action.

The intention of the parties was not to pass title out of the Woolen Company, and it is true that they "labeled" the transaction a "consignment," which we think to be correct, but conceding that it was not a consignment, it certainly was a "sale" and a "conditional sale" at that.

If conditional, title did not pass until payment. If an absolute sale, the bankrupts had the right to return the goods, and in doing so, paid a lawful debt, and are not liable for anything invoked in this action.

The formation of the Niagara Company having been held to be without actual fraud, there could be no legal one, since by its formation, and by the erection of conspicuous signs in its place of business notice was given to the world of its existence, and inquiry on the part of any creditor would have elicited its relations to the Woolen Company and the Horowitzes. Instead of aiding in any secret scheme, it called the attention of the trade to the open method in which business was being done.

Why then should creditors who do not appear to have been in any way dammified or injured by the dealings between the Woolen Company and the Horowitzes be allowed to successfully attack a scheme which was not only not intended to defraud any one—in fact, did defraud no one—and is as far from the swindling scheme charged in the bill of complaint as any honest series of transactions possibly can be?

Both upon the law and upon the facts, we submit that the complainant was not entitled to recover.

POINT VI.

The judgment and mandate of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

DANIEL P. HAYS,
Solicitor for Appellees.

DANIEL P. HAYS,
EDWIN D. HAYS,
Of Counsel.

(Also Supreme Court, U. S.,
No. 1, Oct. Term,
NOV 14 1913
JAMES D. MAHER
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 65.

CLIFFORD G. LUDVIGH, AS TRUSTEE IN BANKRUPTCY OF THE ESTATE AND EFFECTS OF PHILLIP HOROWITZ AND JOSEPH HOROWITZ, INDIVIDUALLY AND AS CO-PARTNERS, ETC.,

Appellant,

against

THE AMERICAN WOOLEN COMPANY OF NEW YORK AND THE NIAGARA WOOLEN COMPANY,

Appellees.

REPLY BRIEF FOR THE APPELLANT.

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

[illegible], 49 Beekman St., New York.

IN THE

Supreme Court of the United States.

CLIFFORD G. LUDVIGH, as Trustee in Bankruptcy of the Estate and Effects of Phillip Horowitz and Joseph Horowitz, individually and as copartners, etc., Appellant, *against* THE AMERICAN WOOLEN COMPANY OF NEW YORK and the NIAGARA WOOLEN COMPANY, Appellees.	October Term, 1913, No. 55.

REPLY BRIEF FOR APPELLANT.

The brief which the appellee's counsel submit demonstrates, in spite of all the ability it manifests, the difficulty of making a good case out of bad facts. The construction of the written agreement is one thing; as to that we stand upon the view expressed by Judge HOUGH, with whom Judge LACOMBE concurred, supple-

mented by such suggestions as we were able to offer in our principal brief here. The consideration of the facts relating to the parties' conduct is the point upon which our opponents meet with even more difficulty, and of necessity; for the whole current of events is manifestly against them. They claim that the goods were merely consigned and not sold by the American to Horowitz; but how can they answer all the circumstances which show that all the parties regarded the goods as sold? They claim that the Niagara was a cash box to safeguard the American, but how can they answer all the facts which show that it never was intended to have that effect, and did not? They revive the claim that the Niagara was an independent entity, but how can they answer the facts which show that it was not so treated by any of the parties until Horowitz became bankrupt?

They have not attempted to answer these facts as a whole; they have been compelled to satisfy themselves with special instances and special details. The result is a highly tenuous argument, which cannot be convincing, for it is set against the whole current of the events which the record displays.

And, as might be expected of such an argument, it contains inadvertent errors.

In the first place, the appellee claims that while the invoices were the usual printed forms used in case of sales, yet special typewritten language is used showing that the goods were consigned instead of sold. If this was so, why was the name of the salesman written in each invoice as "*salesman—Muldoon* (the name Mul-

doon being written)." We have already called attention to this circumstance in our principal brief (p. 44), and it is not necessary to repeat what we there said.

The appellee's statement with regard to the American Company's refusal to take back goods appearing on page 11 of his brief is not sustained by the record. The appellee states that these were special goods which the American Company did not wish to consign, and therefore the appellee, before consigning them, made Horowitz guarantee the Woolen Company from loss in case they were not sold and it had to take back the goods. In other words, the appellee claims that this was a mere special instance of a sale. On page 24 of his brief, however, the appellee weakens this claim by saying that the refusal of the American Company was "at the most an attempt on the part of an agent of the Woolen Company to force the Niagara Company to keep and endeavor to sell the goods in question. It cannot outweigh the positive intention of the parties as expressed in their written agreement and by their course of conduct." The appellee evidently felt impelled to make this qualification, because *there is nothing in the record to justify the assertion that these goods were the subject of a special contract of sale outside of the usual agreement.* Page 148 of the record, to which he refers, does not justify this claim. On the contrary, the guarantee of Horowitz (Plaintiff's Exhibit 12) there set out refers to the goods as "consigned to Horowitz." Also on page 140 the American Company in its letter (Plaintiff's Exhibit 13) refers to the goods as "consigned to us." *In other*

words, these goods were "consigned" just like all the others were; there was nothing special in the circumstance.

Nor is the appellee's argument with regard to the discounts very convincing. The appellee claims (brief, p. 11) that the discounts were to depend upon the time within which the Niagara Company turned over the money to the American Company, whereas had the contract been one of sale the discount would have been figured from the time of delivery of the goods and not from the time of the sale (see also pp. 17 and 21 of appellee's brief).

The best answer to this is to be found in the memorandum made by an officer of the American Woolen Company (Plaintiff's Exhibit 16) which states "*sales* to be made on terms of 8-60 days; we accept payment on account of sales on average due date" (Rec., p. 150). *Thus in the very mention of the discounts, the parties considered that they related to sales to the Horowitzes, not consignments.*

The fact that the American figured the discounts from the date that the Horowitz's re-sold the goods, instead of the date when they received them, is easily explained by the fact that goods were often charged to the Horowitz's before they received them (Rec., pp. 136–138). As Hartough testifies, "the merchandise was in Philip Horowitz's place, but some of it was also kept in the American Woolen Company's warehouse until it was required and then it was taken out" (Rec., p. 136). Consequently a fairer method in the main of figuring the discounts would be as arranged. It must also be noted

that this sort of arrangement would stimulate the Horowitzes to do what the agreement permitted, *pay the invoice prices in advance of resale;* which, of course, is inconsistent with a consignment arrangement.

The appellee does not in effect deny that the bookkeeper and auditors acting for the American depended upon the Horowitzes for their information, but offers the suggestion that these officials "must necessarily have seen what was going on and have had general first hand knowledge of the transaction" (Brief, p. 12). The answer to that is afforded by the testimony of Mr. Dauber and Mr. Hartough, to which we refer in our brief (pp. 67, 78, 19-23). *They testify that they did not have first hand knowledge.*

The appellee makes much (Brief, pp. 13-15) of Judge Hough's language that there was no departure from the letter or spirit of the written agreements. *But the appellee does not refer to the learned Judge's language that the letter and spirit of the agreements, or as he describes it, "the whole and avowed meaning and intent of the arrangement," was "not to consign goods to the Niagara Company, but to enable Horowitz & Son to sell goods at their own prices without owning them"* (Rec., p. 214).

The appellee refers to Horowitz's testimony that "I wasn't supposed to sell; I wouldn't sell under cost" (Brief, p. 29). Horowitz was then describing his conversation with Murphy of the Woolen Company which lead up to the new agreements. Previously he had testified:

"Mr. Murphy said I was to get the goods at the

price I bought same as before and sell them for any price I pleased and that whatever I would get above the price-list price, that would be my profit."

Then, on being asked what was said about the contingency of his selling below cost he answered: "I wasn't supposed to sell; I wouldn't sell under cost" (Rec., p. 68).

That simply meant that the idea of selling below cost never entered the minds of either Horowitz or Murphy at the time of the discussion, because both were thinking of making profits; but it is quite another thing to say that by this conversation an agreement was made binding the Horowitzs not to sell below cost. Of course, ordinarily they would not do this for their own interest. But that does not lead to the conclusion that they agreed not to do it. There was nothing in the written agreement which followed this conversation prohibiting them from selling below cost, as we have shown in our main brief; there is nothing to show that they ever otherwise agreed to that effect.

In the attempt to show that the "Niagara Cash Box" arrangement safeguarded the Woolen Company, counsel are inconsistent. They claim that the proceeds of sale when paid into the Niagara Company's bank account were so situated that neither the Horowitzs nor the Niagara Company would use them without committing a crime, and counsel say that these moneys were held by the Niagara "for the Woolen Company." That theory, however, is inconsistent with the suit which the Niagara Company brought against Horowitz, the judgment roll in which appears, over our objection

and exception (Rec., pp. 130-140) as Exhibit "Y." (Rec., p. 179) in this action. There the Referee finds, at the plaintiff's instance, that the Niagara received checks "for goods sold and delivered *by it*" (Rec., p. 185), *and that the money "belonged to the Niagara Woolen Company"* (Eleventh finding, Rec., p. 187). *Certainly the money did not belong to the American. As we have shown in our Main Brief, the American could never draw any money without the counter signature of Joseph Horowitz. The American thus could not use the money without either getting Horowitz signature or forging it.*

The appellee also errs in stating that Judge Hough found that the $1,200 a month which Horowitz received was paid out of the profits as long as it was paid (p. 44-5). Judge Hough's opinion does not admit of this interpretation. Judge Hough said just what the evidence showed, and no more, that no dividends were ever paid on the Niagara stock, nor were any earnings of the company shown *in excess* of $1,200 (Rec., p. 209). *Nor were any earnings ever shown at all, and the so-called treasurer of the company, Dazber, testified that he cannot tell from the Niagara's books, even at the present day, how much was owing to the American Woolen Company* (Rec., p. 115). It must be remembered that the theoretical agreement with Horowitz was that he was to be paid $1,200 a month to be charged against his share of the profits, and that Horowitz owned all but a nominal amount of the Niagara's capital stock. If the agreement had been seriously intended, then it was to the interest of Horowitz to have the Niagara from

time to time declare a dividend so as to offset the profits thus demonstrated against his indebtedness caused by his $1,200 a month drawings. *That would have been the most obvious way of showing that Horowitz in fact drew only profits, and that the entire amount which he drew was justified by an equal amount of profits coming to him.* But nothing of the sort was ever done, and the books of the Niagara, so far from showing that Horowitz was ever entitled to any profits whether in excess of $1,200 or below it in any month, do not show anything on the subject.

And finally the appellees point as to the alleged variance between the allegations of the bill and the brief is not well founded. On the contrary, the Judge of the District Court found that "the bill is broad enough to fairly cover the claim now put forward by the trustee" (Rec., p. 211). The Court of Appeals agreed with him, construing the bill as "praying that the agreements of November 25, 1902, above mentioned and the removal of the said goods might be declared void under the bankruptcy act as in fraud of the creditors of Horowitz & Son, and that the defendants might be decreed to deliver the woolens removed by the American Woolen Company or their value," etc. (Rec., p. 225).

In view of this agreement of the lower courts, we did not deem it necessary to encumber our main brief with any extended discussion of the point now raised. The following is now submitted for this Court's assistance, if required:

The bill charges fraud, which is of the class known as constructive or presumptive fraud. The courts be-

low have considered that the fraud charged by the bill is constructive fraud, which, as Pomeroy has said, includes all cases of conveyances in fraud of creditors (Pomeroy Equity Jurisprudence, secs. 968, 922). Taking any aspect of the bill that you please, you arrive at the same result. If, as we contend, the transaction in effect amounted to a sale of the goods to Horowitz by the American Company, yet the American Company attempted to fasten a lien upon the goods in the event of Horowitz's bankruptcy by means of the Niagara's fictitious existence, and this lien as against the creditors of Horowitz, is fraudulent. If the transaction is considered as amounting to a conditional sale of the goods to the Horowitzes, then the freedom allowed Horowitz in dealing with the goods is, as against his creditors, fraudulent.

So far as the outside public was concerned the evidence is uncontradicted that the customers to whom the Niagara goods were sold "*knew they were buying from Philip Horowitz & Son*" (Record, p. 75).

It is conceded on the record that none of the agreements were ever filed or recorded in any public office (Rec., p. 42), and if they had been it would have made no difference, for, as this Court has said:

> "It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit for what they apparently own and possess."
>
> *Robinson* vs. *Elliott* (22 Wall., 513, 525).

While, as Judge Hough says, the presence of the

Niagara Company at the Horowitz store was advertised by a sign, that circumstance cannot remove the element of fraud. In a precisely similar case, where the sign of the alleged owner appeared on the door together with th sign of the alleged consignee, Judge Holt held:

> *"I do not think that these signs indicate with any clearness who was the tenant or actual occupant of the premises. If there were any distinction to be drawn I would infer that it might be a little in favor of Radon & Co., who had occupied the premises before. * * * I think the signs are entitled to very little weight as evidence in determining who was in possession and occupancy of the premises, and they certainly do not affirmatively establish that Schefer, Schram & Vogel were in possession of the premises and that Radon & Co. were not."*
>
> *Ryttenberg* vs. *Schefer* (131 Fed., 313, 320).

It having been shown that the Horowitzes were actually in control of the goods on their premises, it was not necessary for the plaintiff to show by the testimony of each creditor that he in fact relied on the Horowitzes being the owners of the goods. This, of course, would not be necessary if, as we claim, the arrangement between the parties amounted to a sale of the goods to the Horowitzes, despite the fraudulent creation of the Niagara Company. Nor would it be necessary if this transaction is viewed as a case of conditional sale, because the freedom allowed the Horowitzes, as we have shown in the fourth point of our brief, affected, as

matter of law, a constructive fraud upon the Horowitz creditors. The point is well put in one of the cases cited by us (*Edgell* vs. *Hart*, 9 N. Y., 213), where the Court said that the manifest tendency of such arrangement was to defraud creditors by giving to the mortgagor a false credit. And as said in *In re Garcewich* (115 Fed., 87), also cited by us, such a transaction "will be presumed fraudulent as against purchasers and creditors." As has been said by the Circuit Court of Appeals in the Fourth Circuit:

> "It is not necessary that it should appear that the creditor became such on the strength of the possession by the debtor of the property attached or levied on in view of the presumption of absolute ownership arising from such possession."
>
> *H. K. Porter Co.* vs. *Boyd* (171 Fed., 305).

As is said in the Eighth Circuit:

> "The inevitable tendency was to mislead and deceive, and the presumption must be indulged in that they were misled to their injury."
>
> *In re* BOTHE (173 Fed., 597).

The same principle has been expressed by Mr. Justice Bradley of this Court, both here and on circuit (*Casey* vs. *Cavaroc*, 96 U. S., 467); *Frelinghuysen* vs. *Nugent*, 36 Fed., 229).

The appellees must be held to have intended this result, because, as is emphatically shown by the case of *Coleman* vs. *Burr* (93 N. Y., 17), cited in our main brief,

men always must be held to have intended the natural consequence of their acts, no matter what their actual intent was.

Dated November 8, 1913.

Respectfully submitted,

ABRAM I. ELKUS,
GARRARD GLENN,
Counsel for Appellant.

LUDVIGH, TRUSTEE IN BANKRUPTCY OF HOROWITZ, *v.* AMERICAN WOOLEN COMPANY OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 55. Argued November 7, 10, 1913.—Decided December 15, 1913.

A contract under which goods are delivered by one party to another to be sold by the latter and proceeds paid to the former less an agreed discount, the unsold goods to be returned to the consignor, is really a contract of bailment only, and the consignor can, in the absence of fraud, take them back in case of the consignee's bankruptcy. 188 Fed. Rep. 30, affirmed.

THE facts, which involve the construction of a contract for consignment of goods to a bankrupt and the rights of the consignor thereunder, are stated in the opinion.

Mr. Abram I. Elkus, with whom *Mr. Garrard Glenn* was on the brief, for appellant.

Mr. Daniel P. Hays, with whom *Mr. Edwin D. Hays* was on the brief, for appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This was a suit in the District Court of the United States for the Southern District of New York by Ludvigh, as trustee in bankruptcy of the firm of Philip Horowitz & Son, to set aside as fraudulent certain transactions of the bankrupts with the American Woolen Company of New York (which we will call the "Woolen Company"), and to recover for goods taken from the bankrupts by the Woolen Company prior to the institution of proceedings

in bankruptcy. The District Court held in favor of the trustee and sustained his right to recover the value of the goods so taken (176 Fed. Rep. 145). Upon appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the District Court was reversed (188 Fed. Rep. 30), and the case is here upon appeal.

The facts as found by both courts are very little in dispute. It appears that Horowitz & Son, the bankrupts, had had a contract in writing with the Woolen Company which expired on December 1, 1902, whereby goods were to be consigned to Horowitz & Son, the title to the merchandise or its proceeds to remain in the Woolen Company until fully accounted for, all bills of such consigned goods to be payable to the Woolen Company and accounts of sales to be rendered to that company at least once a month. The Horowitzes were also to give security to protect the Woolen Company from any failure to perform the contract; the profit of the Horowitz firm was to be the difference between the invoice prices and the selling prices of the goods; they were to have seven per cent. discount for payment within four months and any increase in profits by varying the terms of trade was to go to them, and they were to have a drawing account of $1,200 a month, provided the goods sold by them warranted such payment. In 1902, for reasons which do not distinctly appear in the record, the Woolen Company expressed its desire to have the Horowitz firm incorporated, and a corporation was formed under the name and style of The Niagara Woolen Company (which we will designate the "Niagara Company"), for the purpose of contracting and dealing with the Woolen Company and of dealing in fabrics received therefrom. One hundred and ninety-five of the two hundred shares of the Niagara Company were issued to Philip Horowitz, as fully paid up, in consideration of a mortgage by him on certain real estate for $19,500. A contract in writing was entered into by the

terms of which it was agreed that the Woolen Company would deliver such merchandise to the Niagara Company as it saw fit and that the Niagara Company would accept possession of the merchandise upon the following conditions: The Niagara Company should hold and care for the merchandise as the property of the Woolen Company, the title thereto or proceeds therefrom being vested in the latter company and the merchandise being at all times under its control. The title to the merchandise was to pass directly from the Woolen Company to the purchaser. The property was to be insured for the benefit and in the name of the Woolen Company. The Niagara Company was to be given the usual discounts allowed by the Woolen Company and was restricted to the city of Elmira, New York, and the State of Montana in doing a merchandise business other than as provided in the contract. The Niagara Company agreed to execute such other documents as the Woolen Company deemed advisable to carry out the agreement, and the Woolen Company had the option to terminate the agreement upon the breach of any condition by the Niagara Company. The agreement further provided:

"IV. Said party of the second part [the Niagara Company] agrees to sell such merchandise to such persons as they shall judge to be of good credit and business standing, and to collect for and in behalf of the party of the first part [the Woolen Company], all bills and accounts for the merchandise so sold, and to immediately pay over to the said party of the first part any amount collected as aforesaid immediately upon its collection, minus, however, the difference between the price at which said merchandise so collected for has been invoiced to the party of the second part and the price at which said merchandise has been sold as aforesaid by the party of the second part.

"V. Said party of the second part does hereby guarantee the payment of all bills and accounts for merchandise,

possession of which is delivered to it under this agreement, and it hereby agrees in case any merchandise delivered under the provisions of this agreement by the party of the first part to the party of the second part, is not accounted for to the party of the first part under the provisions of Clause IV, of this agreement, to pay to the party of the first part the invoice price of said merchandise, and thereupon title to said merchandise, or to the proceeds thereof, so paid for shall pass to the party of the second part, and shall then be exempted from the provisions of this agreement.

* * * * * * * *

"VIII. This agreement shall continue for one year. If, for any reason, this agreement terminates, all of the merchandise, possession of which is held by the party of the second part under this agreement, shall at said termination be immediately returned to the possession of the party of the first part."

At the same time an agreement was made by the Woolen Company and Horowitz & Company and one Jeremiah P. Murphy, whereby Horowitz & Company guaranteed the performance of the contract of the Niagara Company, and the Horowitzes, in accordance with the contract, transferred 197 shares of that company's stock to Murphy, who really represented the Woolen Company, in trust, the stock to be voted as the Woolen Company directed, except that so long as the Niagara Company and the Horowitzes performed their agreements the stock should be voted for whomsoever they designated for president of the Niagara Company and should be used in all meetings as though the Horowitzes had control of it, and they were to receive the dividends thereon. Upon breach the stock was to be transferred to the Woolen Company or whomsoever it designated. Horowitz was elected president of the Niagara Company and one of the Woolen Company's employés was made treasurer of the

company: the by-laws of the Niagara Company provided that checks on the funds of the company were to be signed by the president and treasurer jointly. The Niagara Company had an office in part of the premises of Horowitz & Company with a sign on the outside door under that of Horowitz & Company. Afterwards the Woolen Company put in a bookkeeper who kept an account of the goods billed to the Niagara Company and of sales and payments reported by the Horowitzes. The goods were sold in the name of the Niagara Company and until May, 1904, when Philip Horowitz began to embezzle the funds of the Niagara Company by indorsing checks payable to the company for sales made by it and depositing them in his personal account, such funds were deposited in the bank account of the Niagara Company. An amendment to this contract extending it for another year and changing it in respect to discounts, requiring the Niagara Company to make monthly accounts of sales, giving to it a discount of eight per cent. upon all invoices the amounts of which were turned over to the Woolen Company within sixty days after sale by the Niagara Company, and then a further discount of two per cent., but obliging the Niagara Company to pay six per cent. interest on invoices the amounts of which were not turned over to the Woolen Company within sixty days, was made on November 11, 1903; otherwise it continued in force.

On October 26, 1904, a suspicious fire occurred on the premises and Philip Horowitz immediately left the country and has not been heard of since. On or about that date the Woolen Company removed from the premises of Horowitz & Co. 760 pieces of goods which had been consigned to the Niagara Company and for the value of which this suit was brought by the trustee, bankruptcy proceedings having been instituted shortly thereafter.

Both courts found that, whatever the true character of the Niagara Company was, there was no actual fraud

in the transaction. It is quite probable that the Woolen Company desired the method of doing business through the medium of the Niagara Company because it was deemed to be a better legal form and because it wanted to more effectually check up the transactions of the Horowitzes. The opinion of the District Court, as well as the opinion of the Circuit Court of Appeals, shows that the case has been made to turn mainly upon the interpretation of sections four and five of the agreement with the Niagara Company, which, the District Court found, was only another name for the Woolen Company, and which, the Circuit Court of Appeals found, was a sort of cash box for the Woolen Company and a check upon the transactions of Horowitz & Company. We think an examination of sections four and five, when read in connection with section eight, shows most clearly that the Niagara Company was not obliged to pay for goods in its possession and unsold.

By the provisions of section four the party of the second part, the Niagara Company, was obliged to sell to persons adjudged to be of good credit and business standing and to collect for the party of the first part, the Woolen Company, accounts for merchandise sold and immediately pay over to it the amounts collected, less the difference between the price of the merchandise as invoiced to the Niagara Company and the price at which it was sold. In section five of the contract the Niagara Company guaranteed the payment of bills and accounts, and agreed, in case any merchandise delivered was not accounted for *under the provisions of clause four*, to pay to the Woolen Company its invoice price, whereupon title to the merchandise or proceeds thereof was to pass to the Niagara Company and they were to be exempt from the terms of the agreement. That part of section five relating to goods not accounted for refers specifically to the provisions of clause four of the agreement, which deals with goods sold

only. The entire contract must be read to ascertain the purpose of the parties, and we find in clause eight, limiting the agreement to one year, the provision that if for any reason the agreement terminated all of the merchandise, the possession of which was held by the Niagara Company under the agreement, should be immediately returned to the Woolen Company. The District Court held that this agreement, sections four and five, obligated the Niagara Company to pay for each and every piece of goods delivered under the contract with it, but for the reasons we have stated we cannot agree with this construction. We find that the agreement was really one of bailment for the purpose of sale, with the right to return the unsold goods. There is nothing illegal in such contracts when made in good faith. As this court held in *Sturm* v. *Boker*, 150 U. S. 312, 330, an agency to sell and return the proceeds or the specific goods stands upon the same footing as a bailment where the identical article is to be returned in the same or altered form and title to the property is not changed. It therefore follows that, if there are no other circumstances controlling the situation and establishing that this contract was a mere cover for a fraudulent or illegal purpose, there is nothing in its terms operating to transfer the title to the goods to the Niagara Company or to prevent the return of those unsold to the Woolen Company or their being retaken by that company upon the happening of the contingency shown in this case.

But it is insisted by the counsel for the appellant that the conduct of the parties shows that their real purpose and understanding were to make an effectual sale and that the writing, even if interpreted to withhold the title by its terms, was merely a convenient resort to fortify the right to take the goods in event of disaster overtaking the Horowitz concern. Some of the most cogent of the circumstances relied upon will be noticed. It is said that the Horowitzes selected the goods, whereas under the

contract the Woolen Company had the right to turn over any it saw fit; but this circumstance may be readily explained for the Horowitzes were familiar with and of course interested in their own trade and more likely than anyone else to make proper selections for it, and from the sale of the goods chosen they were to make their profits.

A letter in evidence written in December, 1903, by an agent of the Woolen Company in answer to a request to take back goods contained the statement that the Woolen Company could not at that late date consent to have fall goods made expressly for the Horowitzes and delivered in accordance with the terms of the agreement turned back in the stock. It is true that this circumstance is more consistent with the idea of sale than of bailment, but it had reference to goods which were delivered and evidenced the desire of the Woolen Company to have them sold under the consignment as the parties intended.

It is urged that the goods were not kept separately, but it appears that the tags of the Woolen Company were left upon the goods and it is not shown that any creditor relied upon mismarking or misbranding. And memoranda are in evidence showing the names of certain salesmen thereon, but on these same bills it is stated that the goods were furnished under the agreement already referred to.

Against these considerations are the positive terms of the agreement, found to be free from fraud and fairly entered into, which as we interpret them permitted goods unsold to be returned. There is the further undisputed fact that until Philip Horowitz began in the spring of 1904 to violate the agreement checks for sales were quite uniformly deposited to the credit of the Niagara Company and the proceeds turned over to the Woolen Company; that the Woolen Company had a bookkeeper in the Horowitz place, who kept account of the goods consigned and sold; that checks were required to be indorsed by Horowitz and

a representative of the Woolen Company, and that an agent of the Woolen Company frequently visited the concern inquiring into the sales and urging prompt collections. The Horowitzes and the Niagara Company were not permitted to keep the proceeds of the sales or to use them for their own benefit, and this was only done through the fraudulent conduct of Philip Horowitz in violation of the agreement and the purpose of the parties.

We are unable to find that this contract was either actually or constructively fraudulent, and hold, as was found in the Circuit Court of Appeals, that it was what it purported to be, a consignment arrangement with the net proceeds of sales to be accounted for to the consignor and with the right to return the unsold goods. Finding no error in the decree of the Circuit Court of Appeals, the same is

Affirmed.

END

OF

CASE